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RESALE PRICE MAINTENANCE LEGISLATION

IN THE UNITED STATES

Prepared by

HARRY S. KANTOR

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ANNE GOLDEN

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Prepared by Harry S. Kantor

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SPECIAL STUDIES SECTION

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FOREWORD

This report is not intended as a complete study of the problem of resale price maintenance and its intricate social-economic ramifications. It is a statement of recent developments, with brief comment on their economic setting and significance. The phenomena discussed in this report are in process, and remarks made are therefore tentative.

Primary sources were used wherever time and personnel permitted. Records of congressional and NRA hearings were examined. Records of State hearings on the Fair Trade legislation were not available. The text assumes familiarity with the laws and other basic materials of the appendices: they are referred to but, with few exceptions are not quoted in the body of the report

L. C. Marshall
Director, Division of Review

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I. SUMMARY

1. Definition of Resale Price Maintenance

Resale price maintenance in the effective stipulation by the producer or vendor of the price at which a product which he sells is to be resold. The practice is most frequently used in the marketing of branded goods; the price set is generally that to be paid by the consumer. Discounts allowed to intermediate vendees may be either fixed uniformly as part of the control of ultimate price, or left to individual bargaining.

The essential characteristic of resale price maintenance in its most common manifestation as a price control device, is that control is exercised over the price of a product after title has passed from the maker or the owner of the brand name to a vendee who resells. This is distinct from control of price charged by a producer's selling agent or consignee. An agent or consignee does not own the product: the producer holds title and bears the risks of the market until the goods are sold. The legal problem of resale price maintenance as it appeared to the Supreme Court of the United States during the past thirty-five years was whether the vendor's right of stipulating conditions of sale could properly be viewed as including the right to enforce the price set by him for resale by his--or subsequent--vendees.

2. Resale Price Maintenance Methods

Various methods have been used in attempts to maintain prices. The most important were: writing contracts in which resale price was stipulated; affixing a notice to products stating the resale price and informing vendees that their purchase of the product for resale involved acceptance of the obligation to observe the price set in the notice; refusing to sell to price cutters and exacting assurances from resellers, particularly wholesalers, that these would not supply a retailer who cut the price of a product with that product or even with other products.

3. Why Resale Price Maintenance Was Attempted

The growth of standardization of merchandise, branding, and consumer advertising gained momentum after 1900. Competing channels of distribution were unequally affected by these developments. Department stores and chain stores, both of which used price-cutting as their chief competitive weapon, developed rapidly. Products well known to the consumer were the obvious centers of price attack. Branded goods and highly standardized bulk, or unbranded goods sustained the heaviest price cuts.

The use of branded goods in price wars among competing types of distributive channel drew the producer into the struggle, by the very fact that his name on the goods made the consumer market his actual market, regardless of the point in the distributive process at which he gave up title to the goods. As a result, manufacturers of branded goods have been faced with exceptionally difficult problems in maintaining regular output and general distribution, and have occasionally suffered the complete disruption of a local market.

Most producers failed to clarify their position, as they might have done by adopting a marketing policy of selling exclusively through a single type of outlet. Since they sold through competing channels, their discount policies and other terms of sale became factors in retail competition. The distributors' competition reacted on the manufacturers, and many manufacturers and distributors looked to resale price maintenance as a solution of the marketing problem.

The idea is an old one. Makers of popular products were trying to achieve resale price maintenance in the late 19th century, in order to avoid the marketing problems involved in wide dispersion and sharp fluctuation in price and to keep the good will of retailers adversely affected by price-cutting. Increasing severity of distributor-competition in the past few years has stimulated pressure for price controls; the familiar device has been pushed forward with unprecedented vigor.

4. Attempts at Federal Legislation on Resale Price Maintenance

The United States Supreme Court has held all of the resale price maintenance methods adopted by manufacturers to be in restraint of trade, except the individual manufacturer's refusal to sell to price-cutters. Bills legalizing resale price maintenance contracts have been before Congress since 1914. These failed repeatedly until 1931, when the Capper-Kelly Bill 1/ passed in the House. It failed in the Senate. In 1933 resale price maintenance was still before Congress. At this time the attention of the trade group backing the Bill was diverted to the writing of codes, in which they hoped to get the same results, and even more.

5. State Legalization of Resale Price Maintenance

In the meantime (in 1931), California passed a bill practically identical with the Capper-Kelly Bill of that year. This bill was ineffective until it was amended in 1933 to provide for action by injured parties against any price-cutter on a price-maintained product, whether or not he had signed a contract. Retailers found themselves unable to get the desired minimum mark-up in the codes, --and when code compliance broke down, so that even the code minimum was not enforced--they organized a movement to secure the passage of laws identical with the California law in other states. This campaign started in October, 1934. The first of the new laws was signed in March, 1935. At the present time, "Fair Trade" laws, permitting resale price maintenance by contract, are in effect in ten states containing 40% of the population of the United States. These are: California, Illinois, Iowa, Maryland, New Jersey, New York, Oregon, Pennsylvania, Washington, and Wisconsin.

6. The Manufacturer's Interest in Resale Price Maintenance

Manufacturer and retailer have both been active in the attempt to legalize resale price maintenance, but the relative importance of the two has changed. In the early years of the movement, manufacturers were most vociferous in arguing the case for price maintenance; in recent years, retailers have become much more active than manufacturers in the attempt to secure resale price maintenance. Independent retailers have always been active participants in the campaign, because they were losing business to price-cutting department

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1/ See Appendix G, Page 85.

and chain stores. There are very few well substantiated cases on record, (although more may have occurred) in which a manufacturer was ruined, or even an important product discontinued, as a result of price-cutting in retail sales. 1/ A manufacturer can shift his market more easily than a small retailer can move his store. The manufacturer, in fact, may change his distributing policy and sell more and more to chains, if they seem to be taking over a territory, despite the fact that chains are notoriously hard buyers. Since price-cuts have an important and possibly a lasting effect in stimulating gross sales, and since the elaborate analyses necessary to determine whether discounts granted are in excess of economies achieved on the transaction are not ordinarily undertaken, manufacturers often welcome orders from large price-cutters even though the terms are very favorable to the buyer. Many manufacturers are therefore disinterested in or opposed to the Fair Trade Laws.

7. Legal Difficulties Under Present Resale Price Maintenance Laws

Until the past few years, chain and department stores were opposed to price maintenance. The depression fostered a rapid increase in the growth of new price-cutting outlets.--"super-markets" and "cut-rate" stores. As a result, some chain stores in drugs and groceries--the principal fields of operation of the new type stores--have joined the old, full line independents in advocating price maintenance. The vital concern of retailers with resale price maintenance has drawn attention to a fundamental difficulty in the proposed federal legislation. Retail trade is predominantly intra-state. State laws are, therefore, an essential part of the full legalization of resale price maintenance.

State laws, however, may be insufficient to cover the situation fully. Sales across a state line are under federal jurisdiction. The writing of a resale price maintenance contract between parties of diverse state citizenship is contrary to federal law. Arrangements under which wholesalers in the state write contracts with retailers, with agreements made but no contract written between wholesaler and manufacturer, are obviously outside the permission of the Fair Trade laws. The agrements would be in restraint of interstate trade. If the writing of the contract is stated, in defense against charge of such agreement, to be a voluntary act on the part of the wholesaler as owner, the way seems to be open for a wholesaler in another "Fair Trade" state to set different prices, and these prices may be objectionable to the producer. The right of the wholesaler to initiate the contracts on a product bearing the name or brand of the producer is moot.

Incorporation by the manufacturing company in each state in which it wishes to maintain prices may prove costly in fees and additional taxes. There is, further, the possibility of unfavorable court decision on the bona fide citizenship of the state companies thus formed. The only complete system of resale price maintenance legislation is one in which there are both state laws and a federal law. There may, of course, be some doubt on the constitutionality of the whole system.

1/ The Coty Company is said to have been forced into receivership by use of its chief product as loss leaders, and subsequently adopted consignment distribution. The Ingersoll Watch is cited as an example of a product that lost its market because of loss leader selling by dealers handling it.

8. Other Types of State Legislation on Resale Price

Resale price maintenance is not the only recourse of those opposed to price-cutting. An alternative was adopted by Connecticut in its Retail Drug Control Act (June, 1935), which is an enactment of the fair trade practice provisions of the NRA Retail Drug Code, including the minimum price provision. This differs from the Fair Trade Laws in two respects. First, it sets a lower limit to price competition in a retail trade as a whole, instead of removing entirely price competition among distributors on products under resale price maintenance contracts and leaving it unrestricted on other products. Second, it defines a relationship between the retailer and the State of Connecticut, with respect to the conduct of an intrastate business. As far as may be seen at present, no additional legislation (federal or other) is needed to ensure its effectiveness as a statute.

The state which has enacted the most comprehensive legislation of all is California, which had added a law prohibiting sale below cost to its Fair Trade Law and its statute forbidding discriminatory discounts. The new law applies to all sales. Its price floor is not defined as clearly as that of the Retail Drug Control Act of Connecticut. The loss limitation act is stated to be an emergency measure, protecting manufacturers and distributors from bankruptcy caused by competitive sales at less than cost. Resale of liquidation stocks is so circumscribed as to prevent the disruption of a market with goods bought at distress prices. The California law prohibiting sale below cost is therefore a generalized enactment of all code provisions on cost protection. It is narrower in that it applies only to intrastate transactions, and broader in that it includes even those industries which did not have cost protection in their codes.

NRA codes governing retail trade attempted to set a floor to restrict price-cutting. The abandonment of codes left retailing with no such price limitation in most of the states. Ten states, however, have enacted laws permitting resale price maintenance contracts on branded goods, Connecticut has covered price-cutting on all products sold in drug stores with its Retail Drug Control Act and California has both a Fair Trade law and a law forbidding sale below cost. It is now possible to observe the course of retail prices, the reshaping of channels of trade, and the trend in sales volume of nationally advertised branded goods and competing private brands or unbranded goods under resale price maintenance, under loss limitation statute, under both, and under no restriction of either type.

9. Pressure for Federal Resale Price Maintenance Legislation

Since there are grave obstacles to the effective operation of resale price maintenance under state laws alone, pressure will be exerted by retailing groups and interested manufacturers to secure the passage of a federal Fair Trade Law. Recent studies of resale price maintenance have failed to establish the economic necessity of this type of price control. Legislators will probably be voting on resale price maintenance or loss limitation in the near future. Careful observation of effects experienced under these laws and in their absence will be of great value in providing men in public life with a basis for decision. It may be desirable to complete the legalization of resale price maintenance in the United States; it may prove advisable to adopt loss limitation as the instrument of price control; the combination of

voluntary price maintenance embodied in Fair Trade Laws and compulsory loss limitation as in the Retail Drug Control Act may be best; no legislation at all of this type may prove to be the most desirable of all these alternatives. Recommendations should be based on analysis of facts; and these can be secured only by thorough investigation.

II. RESALE PRICE MAINTENANCE UNDER FEDERAL LAW

1. Effects of Supreme Court Decisions on Attempts to Set Resale Prices.

While the Court has outlawed six distinct methods of enforcing resale price maintenance, 1/ it has never ruled on the manufacturer's right to suggest resale prices for his products. It has gone even further in recent years and has ruled that where no monopoly exists a trader may announce his conditions of sale and may refuse to sell for any or for no reasons. 2/ Refusal to sell to those who do not follow his suggestion on price is the only way in which a manufacturer can exercise control over the sale of a product after he has surrendered title to it. Any agreement between manufacturers or between manufacturers and wholesalers to refuse to sell is unlawful, 3/ but the approximately simultaneous decision of several manufacturers or wholesalers not to sell to a known price-cutter would not necessarily be proof of conspiracy. The decisions might be reached independently. Even the fact that a manufacturer refused to sell to a reseller who had cut the price of another manufacturer's product would not establish collusion between manufacturers. The one whose product had not been cut could argue that his product was priced competitively with the known resale price of related articles, and that cutting the alternative product weakened the competitive position of his own. This argument might carry over a rather wide range of direct and indirect commodity competition. The legality of a wholesaler's refusal to sell to a price-cutter who is not being sold by a manufacturer is questionable. Collusion might be charged more readily in this case.

If the manufacturer decides to refuse merchandise to the price-cutter, he either loses the sales volume of the price-cutter or faces a severe price-battle, initiated by the merchant boycotted and possibly resulting in the demoralization of the local market. On the other hand, if he takes no steps to stop the price-cutting he may himself be threatened with a boycott by the other merchants in the price-cutter's community.

Boycotting, in order to be effective, must cover the market concerned. The Proprietary Articles Trade Association, In England, uses boycott rather than lawsuit to enforce resale price maintenance controls. But refusal to sell by the individual manufacturer is no assurance that the price-cutter will be unable to obtain the products. Not only can he obtain them from wholesalers, peddlers, and jobbers, but other retailers (according to statements made at NRA hearings) may be willing to order supplies for the boycotted merchant for various reasons. Furthermore, during a business recession, liquidation sales throw large supplies of goods into the open market.

2. Proposed Federal Legislation on Resale Price Maintenance

After the Dr. Miles Medical Company decision in 1911, and the court failures of 1913, it was apparent to manufacturers that free activity in

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1/ See Appendix K, Page 110 United States Supreme Court Decisions on Resale Price Maintenance.

2/ United States v. Colgate Co., 250 U. S. 300 (1919)

3/ See Appendix J, Page 104 "Summary of State Statutes and Court Decisions", New York.

maintaining control over resale prices was impossible without legislation. In the latter part of 1913 and in 1914, the manufacturers were fighting to prevent prohibition of resale price control contained in the proposed Clayton Act. 1/ Positive action in securing legal status for such control was taken even before the passage of the Clayton Act in its final form. Early in 1914, the Stevens Bill, 2/ legalizing resale price maintenance by contract, was introduced into Congress. This was the first of a series of bills on the same subject, introduced in each session from the 63rd through the 73rd Congress. The Metz Bill, 3/ also introduced in 1914, provided for resale price maintenance by notice. Under this form of control, the purchase for resale of a product on which the manufacturer had marked the resale price together with notice prohibiting price-cuts, implied the reseller's acceptance of the obligation to maintain the manufacturer's price. 4/

Support was withdrawn from this bill very early, and proponents of resale price maintenance concentrated their efforts on the bill permitting resale price maintenance contracts. The campaign continued until 1933, when proponents of resale price contracts turned all their energy to writing code provisions, through which they hoped to achieve the desired price control.

In January, 1931, a bill permitting resale price maintenance contracts passed in the House of Representatives. 5/ It did not pass in the Senate. However, since this bill did actually pass one branch of Congress, its distinguishing features will be stated briefly. First, the bill contained a list of excluded products. No price maintenance contracts were to be written on "such necessities of life as meat and meat products, flour and flour products, agricultural implements, tools of trade, canned fruits and vegetables, all clothing, shoes and hats." This list of course, includes a good many items on which there is a demand for price maintenance. Second, the bill contained a provision permitting the vendee to, "resell at a price below the stipulated resale price which yields not less than 20 per centum over the actual bona fide purchase price paid by him." This, in effect, sets a maximum mark-up on competitive products under resale price maintenance contracts.

1/ Hearings on Trust Legislation before the House Judiciary Committee of the 63rd Congress, parts 1 through 35.

2/ See Appendix G Page 79.

3/ See Appendix G Page 83.

4/ A law of this type was enacted in New Jersey, 1913 (amended 1915 and 1916). This method of enforcing resale price maintenance is widely used in France.

5/ HR 11, 71st Congress, 3rd Session, January 29, 1931.

III. THE CAMPAIGN FOR STATE RESALE PRICE MAINTENANCE LEGISLATION

Manufacturers of trade marked and branded articles strongly advocated resale price maintenance from the early days of the movement in the latter part of the 19th Century to the late 1920's. 1/ They had built up goodwill for their respective products through advertising and said they needed legislation designed to permit their control over the prices paid by the customers: without such control their valuable investment in consumer demand was in constant jeopardy from price-cutters. The majority of retailers were proponents of resale price maintenance legislation, because they were faced with the--at that time--severe price-cutting of the department stores.

During the past twenty years, chain stores have been acquiring an increasing share in the nation's retail sales. They use mass merchandising methods--buy in large quantities, get favorablediscounts and allowances,--and pass along to the consumer 2/ at least part of the savings involved. Price appeal is the fastest way of bringing people into new stores. The effectiveness of price-cutting depends upon consumer's price comparisons. The prices of highly advertised products are usually well known and the consumer has accepted more or less definite notions of the qualities of the article he is purchasing. Such products are, therefore, admirably suited for use as price leaders, and were so used by chain stores.

Manufacturers had no way of determining the relative importance as market builders of the new merchants (who concentrated upon price appeal) as compared with the older, "regular-price" merchants. Producers, interested in immediate increase in volume, sold to all who would buy and bolstered consumer demand through extensive advertising campaigns.

As his need for volume increased, the number of restrictions, real or fictitious, which the manufacturer put on transactions in his product decreased. Consequently, manufacturers who as late as 1926 were advocates of resale price maintenance legislation, had by 1930 changed their policies, and were either unwilling to voice a preference or else were definitely opposed. 3/

While manufacturer sponsorship was waning because of the growing importance of the price-cutting outlets, independent retailers' support of remedial legislation became more and more pronounced as their need for protection from price competition became more acute. Resale price maintenance legislation promised the greatest benefit, since it deprived the chain stores of their strongest weapon.

1. Development of Voluntary Chains

Small, independent retailers were also moving on another front in the fifteen years prior to the current depression. Voluntary chains, consisting

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1/ Hearings on Trust Legislation held before the House Judiciary Committee for the 63rd Congress. Parts 1 through 35. Hearings before the House Committee on Interstate and Foreign Commerce held on H. R. 13305 in 1914, and on H. R. 11 in 1926. Hearings before the Senate Committee on Interstate Commerce held on S. B. 97 in 1932.

2/ Federal Trade Commission's Chain Store Study S. D. #4. 74th Congress, 1st Session. (The Commission's findings on prices are summarized on page 53 et seq. of their report.)

3/ House Committee on Rules. Hearing H. R. 11. 1930.

of large numbers of small independent retailers, were able to secure a substantial degree of equality with corporate chains in purchasing economies. It began to appear to some students of distribution that the future retail competition would be a struggle between the two types of chain stores.

The growth of voluntary chains was rapid in the grocery field and fairly rapid in drugs, 1/ but not in either case extensive enough to change the marketing competition into a struggle among large units and aggregates: small retailers continued to predominate in the total number of outlets. Meanwhile, large corporate enterprises in distribution--chain stores, department stores and mail-order houses--were competing strongly with each other as well as with the voluntary chains.

2. The Growth of the "Cut-Rate" Store

The most significant element, however, in the current strenuous campaign for resale price maintenance, is that with the depression, a recently developed type of outlet became the most powerful factor of all competition, from the standpoint of price-cutting. These stores--popularly known as "cut-rates"--handled only the fastest moving items, used very inexpensive store quarters and equipment, and depended on price alone to attract trade. Lack of services to the customer handicapped the "cut-rater" but little in a period when people were buying on price. Manufacturers overstock and bankrupt retailers' inventory offered large sources of supply. 2/ It is largely at these cut-raters and the price wars for which they are blamed, that the current movement for resale price maintenance is directed.

The cut-rate store is predominantly a city phenomenon. Price appeal is enhanced in the impersonal atmosphere of city retailing. Cut-rate stores depend on rapid turnover, and must draw on dense populations. This is evidenced in the sharp difference in degree of urbanization between the ten states which now have Fair Trade Laws and the sixteen which voted against these laws. Seventy-one per cent of the total population of the ten states lives in urban communities, while only forty-nine per cent of the population of the fourteen states is urban. 3/

The campaign for resale price maintenance has thus under gone highly significant changes. It began as an attempt to protect manufacturer's investment in good will. The manufacturers affected were in general those strong enough to afford expensive advertising programs. The movement is now sponsored chiefly by associations of small, independent retailers. It has taken on the character of a crusade in defense of small enterprise. Curiously enough, the growth of the cut-rate store--largely a cyclical phenomenon, but also a development in the direction of reduction of number of price-lines, concentra-

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1/ In drugs, cooperative wholesaling was the most successful form of associative enterprise.

2/ George L. Galer, President, Liggett Drug Company, New York, at the Public Hearing on the Code of Fair Practices and Competition for the Retail Drug Trade, Friday, August 25, 1933, page 163.

3/ Connecticut was excluded from the computations for the states which voted down Fair Trade legislation, because Connecticut later passed the Retail Drug Trade Control Bill. Seventy percent of the Connecticut population lives in urban communities. See Appendix A, page 35 for statistics of states in which Fair Trade legislation was acted on up to October 10, 1935.

tion of fast moving items, and separation of price from service appeal in distribution---has driven some chain stores into the crusade. Early efforts of retailers to secure resale price maintenance were directed at the chain stores themselves. Now some chains are interested in price maintenance, chiefly in the drug field. This field is in fact the focal point of price maintenance agitation. 1/ Weak pure food and drug laws, non-informative advertising, and the hypochondriac tendencies associated with the nervous pace of modern living have built up large sales volume and apparently substantial profits in drug products. The rapid growth of advertising in the past 15 years has intensified competition, but has also resulted in so strong demand for some well-sponsored products that their manufacturers may really be indifferent to price-cutting among distributors. The manufacturer may feel that the retailer cannot afford to do without the product. There is evidence that concerted action has been taken by retailers to induce such manufacturers to support resale price maintenance. 2/ The retailers have assumed the greatest share in the campaign.

In the Spring of 1931, California passed a state law similar in content to the Capper-Kelly Bill of the 72nd Congress. However, when actually applied, the law proved ineffective in arresting or eliminating the losses engendered by extreme price-cutting, because it did not prohibit the sale or offer for sale of price maintained products at cut prices by vendors not parties to contracts. It was, therefore, amended in 1933 to include all transactions in products on which a contract price had been set. The amendment also provided that suit could be brought by any person damaged by the price-cutting. This law was called the California Fair Trade Law, and has served as the model for the succeeding "Fair Trade Laws."

In the Fall of 1934, a movement to secure similar legislation in other states was inaugurated. The proposed acts were known as the "Junior Capper-Kelly Bills," and also as "Fair Trade Acts." This movement was undoubtedly accelerated by dissatisfaction with the results obtained under the codes. Many merchants considered the minimum mark-up in the codes too low to cover handling costs, and competition made it impossible to get more than the minimum mark-up on items used as price leaders. 3/ The total sales of these items constituted an important part of gross sales prior to the code period, and their number increased as a result of code provisions. The price floor was one that any merchant could risk, so that price cuts were quickly met. In order to maintain a reputation as a price-cutter, a retailer had to offer reductions on more and more products. Lower prices on a large number of products may stimulate sales of these products, but the uniformity of the prices destroys their competitive value and their joint-sale use. The net result was a widening area of sub-normal mark-up in retail trade. In addition, there was growing dissatisfaction with the limited effectiveness of compliance

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1/ Very recently, grocery chains have become advocates of restriction on price-cutting. Godfrey M. Lebhar in "Current Comments" in Chain Store Age for May, 1935.

2/ During the summer of 1934, retail drug associations in Portland, Oregon, and Alameda County, California, boycotted a list of ten nationally advertised products, which were being sold by some outlets for less than the druggists' purchase price. Druggists in New York City, Baltimore, Maryland and Los Angeles and San Francisco, California, have been running "Brand X Week." During such a week, all cooperating retailers in the community push the products of the "X" Company, displaying them prominently, but always at the manufacturer's suggested resale price.

3/ See Transcript of Pulbic Hearing on the Code of Fair Competition for the Retail Drug Trade, Friday, August 25, 1933, Volume 1, Pages 188 et seq.

activities. Many retailers became convinced that anything short of a definitely established resale price would fail to arrest the dwindling of their total operating margin.

3. Shortcomings of the Proposed Federal Law

Federal legislation permitting resale price maintenance leaves the practice vulnerable to court attack: sales to consumers in a retail store would very probably be held to be intrastate commerce, regardless of where the retailer bought his merchandise. If both the producer and subsequent vendor have citizenship in a state which has passed the "Fair Trade Law," the legality of the price maintenance contract between them seems assured, with constitutionality of the law the only possible source of difficulty. With diversity of citizenship, interstate commerce is clearly involved and the contract is subject to federal jurisdiction. Full legality would be assured only if there were both a federal and a state law covering. In the absence of a federal law, the producer can operate under the Fair Trade Law by incorporating in the state of the resellers, although there may be difficulties involved in such procedure. 1/ In any case, it is apparent that state legislation is necessary to resale price maintenance, and the campaign for uniform state Fair Trade laws is, therefore, a logical procedure for the advocates of that solution to retail price-cutting.

1/ See Appendix K, Page 110 for a legal discussion on this question.

IV STATE RESALE PRICE MAINTENANCE LAWS

1. Contents of the Fair Trade Laws

Resale price maintenance by contract is now legal in ten states. 1/ California was the first of the ten states in this enactment, with the Badham Act, passed in 1931 and amended, to make it effective, in May, 1933. The other nine states passed laws modeled after that of the California Act, in the five months from March to July, 1935. The chronology of Fair Trade Laws enactment follows California, passed 1931, amended May, 1933; passed in March, 1935, New Jersey, Oregon, Washington; May, 1935, Iowa, Maryland, New York, Wisconsin; June, 1935, Pennsylvania; July, 1935, Illinois.

The following seventeen states considered resale price maintenance legislation this year, but the attempts at enactment were unsuccessful; Alabama, Arizona, 2/ Colorado, Connecticut, 3/ Indiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming. 4/ The bills introduced in Missouri and Minnesota proposed a resale price maintenance procedure known as the Fitch Plan, 5/ which differs somewhat from the bills which have been passed.

Nine of the ten Fair Trade Laws now in effect are practically identical. The Illinois 6/ and Washington 7/ laws differ slightly. The Wisconsin Law contains all of the provisions of the California Law, and an additional section, 8/ the intent of which is to protect the consumer against "unreasonable prices."

1/ Sec Appendix B, Page 37, "Text of the Fair Trade Laws."

2/ Passed by both Houses, Vetoed by the Governor.

3/ Connecticut enacted the Retail Drug Control Bill after voting down the Fair Trade Bill. See Appendix D, Page 66 for text of the law passed and Page 25 of the report for a discussion of the Connecticut Law.

4/ The Alabama Bill and the amended Tennessee Bill died with the adjournment of the Legislatures.

5/ See Appendix E, Page 69 for text of the Fitch Control Plan.

6/ The Illinois law provides for 10 day notice to the manufacturer or primary vendor, by vendee before liquidating his stock according to the exceptions permitted. These are the same as in the other States,-- See Appendix B, Page 39 for text of the Illinois law.

7/ The Washington Law is an emergency measure expiring July, 1937. See Appendix B, Page 52 for text of the law, particularly preamble.

8/ See Page 55 for Section 7, of the Wisconsin Law.

The Fair Trade Laws all provide for contracts between the producer 1/ and a reseller of a branded product, wherein the price at which the product is to be sold is definitely fixed. The vendee in the first instance may recontract with subsequent purchasers for resale, so that the producer is given the right to fix the prices which the consumer pays for the product. If the price of a product is set in such contract, selling it or advertising it for sale at a lower price is actionable by anyone injured thereby, whether or not the price-cutter is party to the resale contract. 2/

Monopoly or restraint of trade by means of resale price contracts is guarded against in all of the laws now in effect. Such contracts may be entered into only on products that are in "fair and open competition with other products of the same class made by others." Furthermore, horizontal agreements are expressly prohibited. Contracts may not be written between producers, between wholesalers or between retailers.

The Wisconsin law provides for the review of prices set in resale contracts, by the Department of Agriculture and Markets, which has the power of cancelling the contract under the following circumstances:

(Subsection 7 (a), Wisconsin 113,25)

> "(7) (a) Upon complaint of any person that any contract containing the provisions referred to in Subsection (3) is unfair and unreasonable as to the minimum resale price therein stipulated, the Department of Agriculture and Markets may in its discretion serve by registered mail upon the parties to said contract notice of the time and place for a hearing on said complaint, at which hearing said parties shall show cause why the said contract should not be set aside. If upon such hearing the Department of Agriculture and Markets shall find that such contract is unfair and unreasonable as to its minimum resale price provisions, said Department may by special order declare such contract to be in restraint of trade."

While the other laws provide only for remedy in case of violation of a contract price, the Wisconsin law makes it possible for anyone to complain against the "unfairness and unreasonableness" of the price itself, to a body

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1/ With the exception of Wisconsin which does not include publisher, the Fair Trade Laws define "producer" as grower, baker, maker, manufacturer and publisher. (The Illinois law does not include any definition of "producer."

2/ It is to be noted, however, that proceeding against a price-cutter who is not party to a contract is much more difficult, in view of the fact that most contracts set a fixed sum as liquidated damage for violation of contract. Proof and evaluation of damage may be difficult in the court action necessary in case of violation by non-parties. This provision may also be more vulnerable to attack on constitutional grounds than the provision governing conduct of parties to contracts.

with definite authorization to set the price aside if it so decides after due consideration. Thus, Wisconsin alone gives the consumer a direct remedy for high prices, in the event that competition fails to operate freely, or brings about price adjustment very slowly. Under the other nine laws competition among manufacturers,--those making branded goods, and this whole class competing with makers of unbranded or "private brand" goods--is relied on to safeguard the consumer.

All of the Fair Trade Laws permit resale at less than contract price for clearance, foreclosure or other conditions of distress. The Illinois law alone requires the seller to give ten days notice to the manufacturer, before selling at the reduced price. It is to be noted that purchasers who buy at distress sales and resell under normal business conditions are fully bound by resale prices set in contracts outstanding in the state in which they sell.

The Fair Trade Laws now in effect provide for exact stipulation of price, not for the setting of a minimum price. The text of the Wisconsin statute includes comment on the fairness of the "minimum resale price therein stipulated." The contracts, however, are permitted to set the "price at which" the product is resold. 1/ Sale at higher prices is not specifically treated in any of the laws, and the extent to which prices will be absolutely uniform on products for which contracts are written is therefore not absolutely clear. There is the presumption, of course, that on popular items competition will be so severe as to prevent any retailer from securing a price above the contract price. A retailer interested in switching a substitute product might well use even a slight mark-up over the contract price to facilitate the switch. This applies only to retailers who are not parties to the controlling contract, and may be a possibility "on paper" only. 2/

Difficulties may arise in the interpretation of the Fair Trade Laws. The Laws read as follows: (The California Law is used here as example. The others are practically identical with it in the section quoted; the

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1/ H. R. 11, 72nd Congress, 1st Session, (The Capper-Kelly Bill of 1931) permitted contracting for resale at "price or prices stipulated." The Oregon law of March 9, 1933, repealed in 1935 with the passage of the new Fair Trade Law, permitted setting more than one minimum price in resale price contracts. Such provisions allow setting "ordinary" prices and "special" prices on articles under contract. It is to be noted also that the repealed Oregon law permitted sale at more than the stipulated prices.

2/ Some contracting parties may, of course, attempt writing contracts in which the stipulated price is called the "minimum resale price."

Illinois, Washington, and Wisconsin laws differ slightly from the other laws in wording):

"Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee."

The laws define "producer" but do not define "owner". The latter was probably included to cover: complex products, parts of which are made for the branding company; products made in their entirety for the owner of a brand-name; products made for a company which has intensively advertised its firm-name.

The problem is, whether or not anyone who has acquired title is permitted to write the contract setting the resale price. This question arises because the law does not say "no contract between a producer and his vendee relating to ...." 1/ but says simply "no contract relating to ....". The wording appears to allow the initiating of contracts on any product which meets the stated requirements.

If, in place of the words "the vendor" (line 10) the law read "a vendor" or "the first vendor to make such stipulation in a resale contract" the meaning would be absolutely clear. If the words "the vendor" are so interpreted, it is clearly possible for anyone holding title to write a resale price maintenance contract on the product, provided the product itself meets

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1/ The repealed Oregon Law did so specify; the new Oregon Law does not. The argument that the change evidences intent of the legislature to change the preceding status does not hold, because the old law was precis and the new one is vague. If the legislature meant to leave the way open for practices not contemplated in the repealed law, it would have stated that fact by defining the new condition. If discretionary power were to be granted to those administering the law, that fact would be stated, and the extent of the discretion defined.

It appears rather that the Oregon Law was replaced in order to remove the difficult conditions circumscribing procedure for redress in the old law, and to achieve uniformity with the California law, which was currently accepted as the model. Even the grammatically peculiar wording of Subsection 2 was copied. The old Oregon Law stated: "2 That the vende or producer require any dealer to whom he may resell such commodity to agree...." In the new law, the words "in delivery", are substituted for, "any dealer". exactly as in the California law,--leaving, "to agree", without any subject.

the requirements of the law, and provided no one else has yet written a contract on it in the state. Obviously, in no case could contracts setting different prices for the same product be written in a single Fair Trade state: the price set in the first contract written would govern. However, if the producer, or the owner of the name by which the product is identified, has no desire to set the retail price, and has therefore not written a resale price maintenance contract, it may be possible for any wholesaler in the state, who has bought some of the product, to set the retail price for the whole state by writing a contract with any retailer.

A producer opposed to resale price maintenance could break such an attempt only at considerable expense, namely by opening retail stores in the state. This would involve not only state incorporation of the company, but might include difficulties as to powers granted in the company's charter. Furthermore, even protesting, without actually offering competing retail sales, would obviously put the producer on record as an opponent of resale price maintenance. Undoubtedly, some companies which are opposed do not wish to make a public and unequivocal statement of their views.

The foregoing interpretation of the Fair Trade Laws would also cover the action of wholesalers in originating resale price maintenance contracts for out-of-state producers. The producer has the right to suggest a resale price, although he can not enforce it except by refusal-to-sell. If the wholesaler decides to write the suggested price into a contract with a retailer, it becomes the stipulated, enforceable price under the Fair Trade Law. This interpretation of the permission granted in the Law is very favorable to the wholesaler, because it obviates, for the producer, the expensive alternative procedures of state incorporation and direct contracts with retailers. Since the producer-wholesaler link is informal, the producer's position in this set-up does not have firm legal foundation.

If the definition of "the vendor" is any vendor or the first vendor in the state, the preceding remarks hold. If "the vendor" is the first vendor of the product in its identified, marketable form, they do not. Since the producer is not a reseller, "he" (3rd word, line 12) refers to the producer's (or "vendor's", line 10) vendee. If the phrase "in turn" modifies the phrase "resell except at the price stipulated", a precedent stipulation is implied. This could be contained only in the contract between producer and his vendee. The distinction made in the words "vendee or producer" (line 11) and the use of the phrase "by such vendor or by such vendee" (lines 13 and 14) appear further to identify "producer" and "the vendor" of line 10. The presumption therefore is that the producer is party to the first contract. The only case in which the producer need not be party to it is that in which the producer is not named on the product--that is, he is anonymous as far as the consumer is concerned. In this case the product lies within the scope of the Fair Trade Laws only if the name of the owner is on it. The owner is, then, the first vendor of the product in identified form and under the name by which it is publicly known.

The presence of both producer's and owner's name on the product would not clearly give either one the right to initiate resale price maintenance contracts. The act says "name of the producer or owner", indicating that one or the other would ordinarily take precedence as being the known and established name: the one whose name is intimately connected with the product

initiates the resale price maintenance contract.

The choice offered in lines 10 - 14 is this: the producer's vendee may re-contract with his own vendee, even if the producer does not require him to do so; and the producer's vendee may set the next resale price if the producer has not already set it. Since ordinarily the producer will set the retail price, the alternative is probably not important. It would give the producer control of dealer's margin but not of retail price. This might easily involve difficulties if the producer sold through more than one channel of distribution.

In conclusion, it may be said that the greater probability attaches to the interpretation of the Fair Trade Laws as permitting initiation of resale price maintenance contracts only by the producer or by the owner of the name by which the product is known. Decision rests with the courts. 1/

2. The Fitch Plan

It should be noted that not all of the acts which failed to pass were identical with those now in effect. Minnesota and Missouri voted on an act embodying the so-called "Fitch-Plan". This provides for the filing of prices with the Secretary of State, instead of contracting with resellers, such filing to constitute notice on all resellers. The Fitch-Plan differs further from the Capper-Kelly Bill in that while any injured party may enjoin a violator, only the maker of the product is entitled to damages. This plan is more characteristically a manufacturer's plan. (The Fitch Company is prominent in the field of drug manufacturing.) The Fair Trade Laws indicate the retailers' interest more clearly by allowing damage suits by any injured party. The fact that the Fitch Plan differs from those laws, probably served to lessen the support for the attempts at its enactment. (In Missouri, producer opposition to any form of resale price maintenance helped to defeat the bill.) The retail group lobbying for the Fair Trade Laws is endeavoring to secure the passage of uniform legislation.

3. Types of Resale Price Maintenance Contract

Resale price maintenance contracts now in use are of three general types. 2/ These are: (a) a contract between a manufacturer (or other producer) and a retailer covering one or more products of the manufacturer: (b) a contract between a wholesaler and a retailer covering one or more of the products of a single manufacturer: (c) a contract between a wholesaler and a retailer covering all of the price maintained merchandise sold by the wholesaler to the retailer, and including the products of one or more manufacturers.

1/ Pending court tests do not involve the question of who may initiate a contract. Cases already decided did not result in rulings on this point.

2/ See Appendix F, page 71, et seq. for texts of the types of contracts discussed.

The first type affords the direct selling manufacturer control over the price paid by the consumer, and may tend to encourage direct sales to retailers. This type of contract involves the greatest expense for the manufacturer. Before he can write individual contracts with retailers, he must incorporate within the state. This involves additional taxes and incorporation fees, besides the added bookkeeping costs. Even with the state incorporation of a selling company, there is danger that the Federal Court will declare the price contracts to be in restraint of trade. 1/

The other two types of contract retain for the wholesaler his place in the distribution system and may be expected to exercise an influence against rapid change from wholesaler selling to direct selling by the manufacturer. Type (c), popularly known as the "omnibus contract," may give rise to difficulties if the competing products of several manufacturers are included in a single contract. The Fair Trade Laws require that the product which is the subject of contract be in "fair and open competition with products in the same general class produced by others." Situations may arise in which an omnibus contract is regarded as tending to restrict competition through the inclusion in the same contract of competing products made by several manufacturers. Wholesalers are urging manufacturers to use the omnibus contract in order to avoid the expense and red tape of incorporating and of writing many separate contracts with retailers. 2/ This type of contract, of course, is most important to the wholesaler as a means of strengthening his faltering position in the distribution system.

1/ In July, 1935, the Pepsodent Company terminated all resale price contracts written by the Pepsodent Company of California because of the possibility of federal prosecution for making direct shipments from Chicago to California jobbers and dealers. Such shipments were apparently regarded as necessary to the efficient conduct of the company's business.

It is possible, also, that the company saw drawbacks to the price maintenance contracts themselves. This possibility is suggested by the fact that two price lists were given in the company's announcement--a "regular price" list and a "special price" list. Distinguishing between "special sales and "loss-leader selling" on the basis of duration of the price-cut is a difficult matter. Price rigidity established by the contracts appears also to rule the products out of use in "sales". See Appendix I, Page 94 for the text of the letter from the Pepsodent Company to the trade announcing the change in policy.

At the meeting of the National Association of Retail Druggists in Cincinnati (September, 1935) the Pepsodent Company announced that it was resuming the use of contracts, and offered to contribute $25,000 toward the expenses of policing resale price maintenance. The company said it was acting on the advice of new counsel, and that reconsideration of Section 1½ of the California Fair Trade Law was an element in the decision. This Section provides for action against price-cutters who are not parties to resale price contracts.

2/ Drug Trade News, July 8, 1935. Page 20

More serious obstacles to price maintenance through wholesalers by producers outside the state are those of authorization and jurisdiction. 1/ If the contract is between parties of diverse citizenship, it is directly in interstate commerce. 2/ Only if the wholesaling firm is agent for the producer, or if the producer incorporates in the state, is the first contract within the scope of the state Fair Trade Law. Despite the costs, many manufacturers have already incorporated selling companies in the state of California, in order to have the first contract on their products one between parties with California citizenship. While the number of state incorporations is much smaller in the states which have more recently enacted resale price maintenance legislation, it appears to be increasing rapidly. 3/ Manufacturers doing a national or regional business have the precedent of California's experience on which to decide their course of action. Incorporating in a large number of states involves expense for charters and may subject the company so doing to additional tax levies. For these reasons, and because the wholesaler can deal more directly with local retailers, manufacturers may be tempted to use omnibus contracts with wholesalers, hoping that a federal law will be enacted before any litigation arises on the question of interstate contracts.

4. Administration of the Fair Trade Laws.

In order to avoid prolonged argument on the evaluation of injury, all the types of contracts now being written provide for the payment of liquidated damages for proved violation of a contract price. Retail druggists in a number of localities are planning to maintain funds, by contribution, for legal expenses. They expect wholesalers and manufacturers to contribute to these funds. 4/ Drug retailers admit freely that they are the principal beneficiaries of resale price maintenance, and recognize that manufacturers might be unwilling to proceed against violators if the price-cutting continued on any significant scale in defiance of outstanding contracts, requiring large outlay for policing and litigation.

One association of retail druggists has already established a policing committee, which is expected to spend all of its time checking up on the support of a number of prominent drug manufacturers, and more specifically, has secured their promise of contributions toward the expenses of the committee. The letter of the association to these manufacturers,

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1/ See appendix J, Pages 98 et seq. "Summary of State Statutes and Decisions." States have been neither uniform nor self-consistent in deciding what constitutes intrastate commerce.

2/ Lawyers will perhaps argue whether or not the action under the contract is performed within one of the states. State court decision on the intrastate character of a transaction is subject to review by federal court.

3/ Drug Trade News, Volume 10, Numbers 12, 13, and 14.

4/ Editorial "Cost of Using Fair Trade Contracts" - Drug Trade News, July 8, 1935, page 20.

mentions the expenses, suggests the contribution, and carries the thinly veiled threat of including in their policing functions that of seeing that the manufacturers's products "are not put under the counter and forgotten." 1/ Chainstores are also participating in the policing, and are contributing to the expenses.

5. The Oregon Fair Trade Law of 1933

The Oregon Law of 1933 differed from the Fair Trade Laws no in effect in two respects. First: The contracts permitted under the law of 1933 were specifically stated to be contracts between producer and retailer, with optional intermediate contracts. Second: Sale at less than the pride set in an outstanding contract was actionable by the producer only, rather than by an injured party; and it as actionable by the producer only on condition that he brought suit at the same time against all vendees of the commodity doing business within the county in which action was taken. This circumscription of redress made it difficult for an injured manufacturer to proceed. The law did not even specify that only price-cutting vendees in the county were subject to suit. Its ineffectiveness is readily understandable. 2/

1/ Southern California Retail Druggists Association. Ltd., has organized a policing department. Drug Trade News, July 8, 1935, page 6, col. 3.

2/ See Appendix C, Page 58,, text of the repealed Oregon Fair Trade Law. (Repealed in Section 7, of the new law, 1935.)

V. THE ECONOMIC SETTING OF THE PROBLEM

The movement for state laws on resale price maintenance has grown rapidly. It is to be feared that insufficient thought has been given to the desirability of these laws from the standpoint of defined objectives and of their effectiveness as means to these ends. Two aspects of the problem need consideration: first, the dissociation of long time trends and cyclical developments, which may be and have been advanced jointly as arguments for resale price maintenance; second, the clear analysis of the justification for the movement from the standpoint of economic and of social trends. In deciding the course of public policy aimed at protecting particular institutions in the economy, legislatures should be informed on the economic merits of the institutions. Policy based on social and political considerations can then be embarked on with knowledge of its economic cost, or the proposed effort might be abandoned in favor of some alternative procedure, so planned as to retain all or the major part of the social advantages believed to inhere in the institutions under consideration.

1. Recent Studies of Resale Price Maintenance

Among recent studies of the problem of resale price maintenance five may be mentioned here as exemplifying work in the field.

Murchison's study 1/ of resale price maintenance in 1919 led him to the conclusion that resale price maintenance required a system of uniform cost accounting: further, that its administration was a matter requiring a competent and impartial body acting on principles laid down by a group of experts with regard to what constituted fair prices under varying conditions of distribution. His proposal did not envisage the uniformity of price advocated by retailers and now embodied in state legislation. The plan, rather, was to permit price differentiation, with a minimum "fair price" for each cost class in distribution, taking account of the type of customer, the services rendered, and the turnover on the individual product. Any outlet could cut under the suggested price provided it did so at a profit.

The study of resale price maintenance by the Federal Trade Commission 2/ (1927-1931) resulted in the following recommendation: "The Commission concludes, therefore, that no legislation permitting resale price maintenance is at present called for." 3/ The Commission admitted frankly that it had inadequately studied the extremely important

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1/ C. T. Murchison, "Resale Price Maintenance," 1919 Longmans Greene & Company

2/ Federal Trade Commission "Report on Resale Price Maintenance" Part I, 1929: Part II, 1931. A previous report (1919), in the preparation of which much less factual evidence was examined, favored resale price maintenance.

3/ Ibid, Part II, Page 6.

problems of economic integration and quantity discount. Since these problems are basic to a theoretically sound decision on the desirability of resale price maintenance, it may fairly be stated that factual studies have not yet adduced convincing evidence of the economic advisability of this form of price control.

Seligman and Love 1/ in their book, favored very gradual approach to the effectuation of resale price maintenance, with the presumption that the development was to be halted at any stage if it appeared to be moving in undesirable channels. They proposed, as a first step, the implementing of the manufacturer's right of refusal-to-sell. They thought that the public temper might gradually become favorable to the idea of resale price maintenance by contract after some presumably successful experience under the modified form of it involved in a strictly enforced program of refusal to sell to drastic price-cutters.

Two other recent publications should be mentioned, "Report of the Royal Commission on Price Spreads," Ottawa, Canada, April 1935. The Commission condemns loss leader selling, but does not advocate resale price maintenance. Albert Haring's "Retail Price-Cutting and Its Control by Manufacturers" (Ronald Press, March, 1935) favors more liberal interpretation of "refusal to sell."

Hurchison regarded the introduction of uniform cost accounting as one of the advantages to be expected from the acceptance of his proposal, which was really a proposal to prohibit sales below fair profit. Seligman and Love thought of price maintenance as part of the broad problem of the formulation of standards of business practices. The largest statistical study completed on this subject, that of the Federal Trade Commission, led its authors to the conclusion mentioned above.

In view of the foregoing remarks it appears that state resale price maintenance legislation can scarcely be said to have adequate support from economic study. The problem has not been solved. The questions of, first, the propriety of governmental regulation of resale price, and second,--if proper--the form which such regulation should take, have not been answered. Legalizing the imposition of retail price uniformity on a distribution system complicated by the instability of manufacturers' selling policies and the criss-crossing of channels of trade is a venture requiring much forethought. This is particularly noteworthy in view of the marketing importance of the products concerned. Resale price maintenance is regarded as a solution of loss leader selling of branded goods. But the problem of loss leader selling is much wider. Bulk products of standard quality are often used as loss leaders.

1/ Edwin R. A. Seligman, and Robert A. Love. "Price Cutting and Price Maintenance" - Harper and Brothers - 1932.

It has not been demonstrated that fixing the point of price control at the fully maintained price is desirable. 1/ A much lower point in the range covered by dealer's margins may be more economic. An example of this is the loss limitation type of control, in which the minimum mark-up is set much lower than the "customary" or "normal" mark-up associated with resale price maintenance. California has already passed a law prohibiting sales below cost, and the Retail Drug Control Act passed in Connecticut establishes the Retail Drug Code price floor.

2. Other Legislation on Resale Price

In 1913, New Jersey enacted a statute permitting resale price maintenance by notice under certain conditions. 2/ The statute prohibited specified practices, if these were done "for the purpose of attracting trade for other goods." A manufacturer could therefore prevent the use of his product as a price leader by affixing to it a notice declaring such conditions as were covered in the law. The phrase quoted above was deleted in the amendment of 1915. This change made the law a general law permitting resale price maintenance by notice. Price cutting of any kind--not merely loss leader selling--could be prevented by the manufacturer of a product.

The law provided that violation of the terms contained in the notice was actionable by the manufacturer or other injured party. Damages could be awarded to the manufacturer, up to three times the loss sustained, at the discretion of the court. Award of damages to injured parties other than the manufacturer was not specified in the law.

The Robt. H. Ingersoll and Bros. Company brought suit on two occasions under this law. In 1915, the Court of Chancery of the State of New Jersey 3/ rules against the Ingersoll Company on the ground that the notice 4/ was too broad, and that it forbade a sale to which the act had no application. Suit was brought under the 1913 form of the act. While the opinion rendered did not specify wherein the notice failed to meet the requirements of the act, it may be noted here that the Ingersoll Company's notice included, among others, the following statements:

1/ Prices in resale price contracts will, no doubt, be set in relation to current market conditions. Drastic price changes are not likely to be attempted.

2/ See Appendix D, Page 61, for the 1913 Law, and Amendments of 1915 and 1916.

3/ Ingersoll v. Goldstein--93 St 193 (1915)

4/ See Appendix H, Page 91, for the notices used by the Ingersoll Company.

(1) That violation of any of the terms of the notice would render the violator liable to law suit for infringement of the patents covering the mechanism of the watch; and

(2) That jobbers were not to sell to anyone "designated by the manufacturers as objectionable."

In 1917 the Ingersoll Company again brought suit. 1/ This time the Court of Chancery upheld the use of notice. The Court held:

(1) That the law in question was not repugnant to the Constitution of the United States or to that of the State of New Jersey.

(2) That the statute was a proper enactment under the police power of the State, "promoting good morals in business."

(3) That the statute did not interfere with interstate trade; and

(4) That the revised notice was in conformity with the terms of the statute.

In neither of these two cases did the Court rule on the propriety of that part of the Intersoll Company's notice which referred to intermediate sales: The company required all sales by wholesalers and jobbers to be made at prices stated in its schedules covering such transactions. These lists were not part of the notice attached to the package, and the enforceability of this requirement was therefore open to question. The defendants in both cases were retailers.

This law has been practically inoperative. It is likely to attract a good deal of attention now, in view of the strong current interest in resale price maintenance. It presents what appears to be a workable and economical alternative to the contracts authorized by the Fair Trade Laws.

Connecticut voted down the proposed Fair Trade Act and shortly thereafter passed the Retail Drug Control Act which is the enactment in state law, of the fair trade practice provisions of the Retail Drug Code. 2/ Drug retailers are again prohibited thereunder from selling any product covered by the former Code at less than the manufacturer's wholesale list price in dozen lots. This is ordinarily higher than the actual net purchase price of the retailer, and is therefore a compromise between prohibition of sale below net cost and full resale price maintenance.

1/ Ingersoll v. Hahn 101 At. 1030 (1917); 108 At. 128 (1918)

2/ See Appendix D, Page 66, for text of the Connecticut Retail Drug Control Act.

Another type of legislation which has a direct connection with the problem of loss leader selling of which resale price maintenance is one aspect, is the act introduced in Idaho. 1/ This act proposed to prohibit the sale of unrelated lines in drug stores. While this act failed, and while the disruption it might cause in existing trade practices makes its passage highly unlikely, the solution it offers to the vexing question of loss leader selling across retail trades is not fantastic. This type of regulation was actually in effect in Cuba prior to the separation from the United States. It is an attack on sales of unrelated products by a retailer in any given field. The Cuban restriction was not limited to drugs, but included all retailing; no retailer was permitted to sell any product not covered by his franchise. 2/

The Idaho proposal was impractical but the idea it was based on--prohibition of loss leader selling of unrelated lines--is important. Many wholesalers have made attempts at securing such prohibition. Retailers find the problem very troublesome, especially in cases in which a retailer finds his whole line or a large part of it used as a loss leader department in a competing department store.

The Connecticut law is a definite, practical measure treating loss leader selling on a much broader front than the Fair Trade Laws. It is not limited only to the use of branded products as price leaders. Bulk goods and unbranded goods of standard quality are often used in exactly the same way as well known branded merchandise, although much less commonly in drugs than in groceries. 3/ Setting a price floor as is done in the Retail Drug Control Act, does not completely cut off price competition in distribution. The uniformity of price established by a resale price contract may actually be a handicap to the manufacturer

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1/ March 18, 1935. "A bill was passed by the Senate here (Boise, Idaho) which prohibits pharmacies, dispensaries, drug stores, or apothecaries where drugs, medicines, chemicals or poisons are offered for sale to operate a soda fountain or restaurant, or sell newspapers, magazines, books, pictures, electrical equipment, jewelry, leather goods, plumbing fixtures, automobiles, automobile tires, radios, furniture, typewriters, wearing apparel, groceries, stationery, hardware, cigars, cigarettes, tobacco, candy, caskets for burial, vegetables, refrigerators, shoes or shoe repairing." Drug Trade News, March 23, 1935, Notes under "Legislation."

2/ Seligman and Love "Price Cutting and Price Maintenance" - Appendix IV, page 520.

3/ Ibid. Appendix II, prepared by Mr. Reavis Cox, page 405, et seq.

in distributing his product. 1/

Resale price maintenance limits price competition on products which are subjects of resale contracts, to the extent that only the maker may change the price. This makes it easier for a producer to gauge his market, but it may be expected to result in reduced flexibility in the price system. It must be remembered, of course, that the Fair Trade laws do not require contracts to be written, but are permissive only. Furthermore, the highly advertised branded goods--on which resale price maintenance contracts are in greatest demand--are in competition with readily available substitutes.

California presents a valuable field for special study since it has had a Fair Trade Law (in amended form) since 1933, and has now passed a general law forbidding sale below cost. 2/ The law prohibiting sales below cost is the broadest price control act now on the statute books. Its effectiveness may be restricted by the fact that in specific instances, enforcement waits on the determination of cost under the inclusive definition given in the act itself, and by the fact that direct sales in California by out-of-state producers or distributors may seriously affect price stabilization of important products.

The enactment of the Retail Drug Control Act and of Fair Trade Acts in adjoining states provides an excellent opportunity for an approximation to laboratory testing of these alternative measures. The course of retail prices under both can be compared with that in states which passed no laws affecting retail prices, and in which the full effects of Code abandonment can be observed.

There is, of course, a large body of state laws on price now in effect. Anti-trust laws and laws against secret or discriminatory prices and discounts have been passed in many states during the past forty years. A number of states have passed legislation aimed at chain stores. These have not yet been analyzed from the standpoint of ascertaining the present status of price regulation in the states and for the country as a whole. The economic significance of each type of price regulating statute, the implications of independent state enactment in consideration of the widely varying degrees of interrelationship of local and national markets, and the postulates and mechanism of a unified price program require close thinking on a factual base.

1/ The Pepsodent Company, on cancelling its resale price contracts in California, recommended two sets of prices on its products. One was the "ordinary" price, and the other was the lower, "special" price for occasional sales. See Appendix I, page 95, for the lists.

As for geographic uniformity, prices set in resale price maintenance contracts need not be the same for all Fair Trade states. Zone prices are now used in a number of industries, and may be the practice under Fair Trade contracts.

2/ See Appendix B, page 37, for the text of this law.

3. The Need for Further Study

Resale price maintenance and prohibition of loss leader selling are phases of the regulation of retail margins. The chief intent of the regulation now ardently advocated is the protection of small enterprise in distribution. Direct selling by producers and the increasing participation of large retailing corporations in antecedent stages of distribution present the problem of integration which has become so important a factor in retail trade. Mass buying by giant retailers exerts pressure on primary producers and on small tradesmen. The inequality in size of retail establishments results in imperfect competition among them. Questions arise as to the economic justification for quantity discounts granted large buyers. If the discount is greater than can be attributed to economies involved, it represents an anti-social use of power rather than a reward for efficiency. Huge corporate retailers also have a powerful weapon in price discrimination. A chain store can cut prices locally to crush competition, and a department store can use a whole department as a price leader, to the detriment of small specialized retailers. However, there has been no precise accounting, so far, of the extent to which protection is needed against unfair trade practices and against the results of relative inefficiency of the small firm.

Resale price maintenance has been advanced as a means of assuring fair competition in retailing. The movement for its legalization has become most vigorous as a result of the growth of cut-rate stores, principally in drug retailing. Cyclical factors in this growth have not been logically distinguished from long time trends. The advocacy of resale price maintenance by chain stores in drugs and in groceries is a very recent development, and a curious one. The chain-retailer, whose principal appeal has always been price, is willing to join forces with the older type of independent store in opposing the new cut-raters who undersell them both. The intent of the chain and the duration of the union are subjects of speculation. The chains may be looking forward to renewed price cutting after the cut-raters are eliminated (if they are) by price maintenance. This would involve a campaign for the repeal of the currently favorable legislation. If the chains expect the legislation to sty in effect, they may be considering their relative position in securing private-label merchandise at substantial discount. Resale price maintenance may prove to be a powerful stimulant to the sale of such goods. Private brands controlled by a retailing organization rich enough to afford large advertising bills and powerful enough to drive hard bargains in purchasing may become a weapon for the still greater relative growth of that organization.

Inner motives of participants in the campaign itself cannot be analyzed adequately from the information at hand for this brief report. Dissection of motives, evaluation of anticipated results, and appraisal of current experience under price legislation are all parts of the study essential to the development of sound legislative policy. The campaign now being waged against cut-rate stores may be truly an attempt to crush a noxious weed rooted in depression soil and crowding out good growth. On the other hand, it may be an effort at obliterating a useful development. Merchandising may be properly divisible on the basis of price and service: one type of outlet selling goods and nothing else, the other

offering goods and services. Crushing a price-appeal outlet may be depriving low-income consumers of part of their real income: they should not be forced to buy services.

It has not been established, however, that loss leader selling results in generally lower margins. It is quite possible, too, that drastic price cuts and adulteration of product occur together frequently enough to be worth investigating. And pressure selling of substitutes is not as great an evil if the substitute is just as good. Product-standards are not adequate at present to provide quick decisions on the relative merits of articles offered for sale in various types of retail store.

While there is no doubt that improved and enforced quality standards will make the machinery of distribution more useful, price phases of the marketing situation are the storm center at present, and require more attention in a current study. Unstable prices and large, fluctuating differences in mark-up may result in costlier merchandising. Consumers could break loss leader selling by buying nothing else from stores using that practice; the stores would gain enormously if they got all the trade of each consumer brought in by a loss leader. Neither happens. The chances of the market change swiftly, prediction is difficult, and "fighting lines" or "fighting stores" must be paid for. Strategy is expensive.

The desirability of legal restriction on price competition in retailing has not been proved: legislation on discounts and allowances might be preferable. The turmoil in distribution and the psuedo-legal or illegal methods used or advocated--pharmacy laws designed as a weapon against price-cutter; boycotts, blacklists, disguised trade-combinations--are the undercurrent of the demand for legislation. If the need is established, alternative methods of regulating retail margins should be considered. Some help may be derived from a brief analysis of foreign experience in this field. The experience of England before and after the official abandonment of free trade should offer valuable guides. Similarly, experience under French and Cuban legislation ought to be reviewed. Foreign experience should be considered in the light of differences between the respective national economies. Obviously, countries with cartellized industry afford a radically different setting for retail price regulation than do countries in which industry is largely competitive. Similarly, the extent of a country's foreign trade as a proportion of its total, alters the degree of protection that its domestic consumers have against excessive prices through legalized combinations in support of price maintenance. While present attempts prescribe horizontal agreements or monopolistic vertical contracts, the possibility that such combinations will develop in this country must be given due thought.

Resale price maintenance and its possible outgrowths may affect profoundly the efficiency of our economic system. Flexibility of prices is reduced by price maintenance. The tendency to monopoly by combination may replace the threat of monopoly resulting from dominance of powerful corporations. Price maintenance affects volume of production. Factual analysis touching all these points is impracticable within the properly defined limits of a study of resale price maintenance and loss leader selling. However, the interrelationships of these underlying economic considerations affect the course of such a study.

The study should make it possible to gauge, at least roughly, the extent to which protection of small enterprise is a social need rather than a matter of increased economic efficiency; that is, the extent to which legislative or administrative measures suggested tend to restore a competition whose play has been impeded, and the extent to which full competition is to be curtailed because the ultimate social effects of letting the battle go to the strong are deemed undesirable. Prevention of monopoly in distribution by such methods may result in increasing the spread between primary price and consumer price. In so far as agricultural products are concerned--that is, in food retailing--a contradiction may develop between governmental policy in retailing and in agriculture. The Agricultural Adjustment Act provides for efforts to achieve "price parity" for farmers, and offers the consumer only this protection: farm prices are not to be raised beyond the relative position they occupied in 1909-14 as a percentage of the consumer's dollar. This provision ignores any increase in service offered by distributors in the past 25 years, and willingly paid for by the consumers under normal conditions. Contribution to the solving of this dilemma may be an incident of the study of price spreads involved in considering the desirability of loss leader or resale price legislation.

The need for such a study is clear: already 40 percent of the population of this country is covered by state laws permitting resale price maintenance contracts, and similar federal legislation is being backed vigorously by the interested parties. Observation by the NRA of the effects of Code abandonment on retail trade should provide the basis for a study on which recommendations for policy can be made. Such recommendations will be highly pertinent in anticipated discussions of federal legislation on resale price maintenance as an alternative to legislation embodying Code fair trade practice provisions on loss leader selling or minimum mark-up.

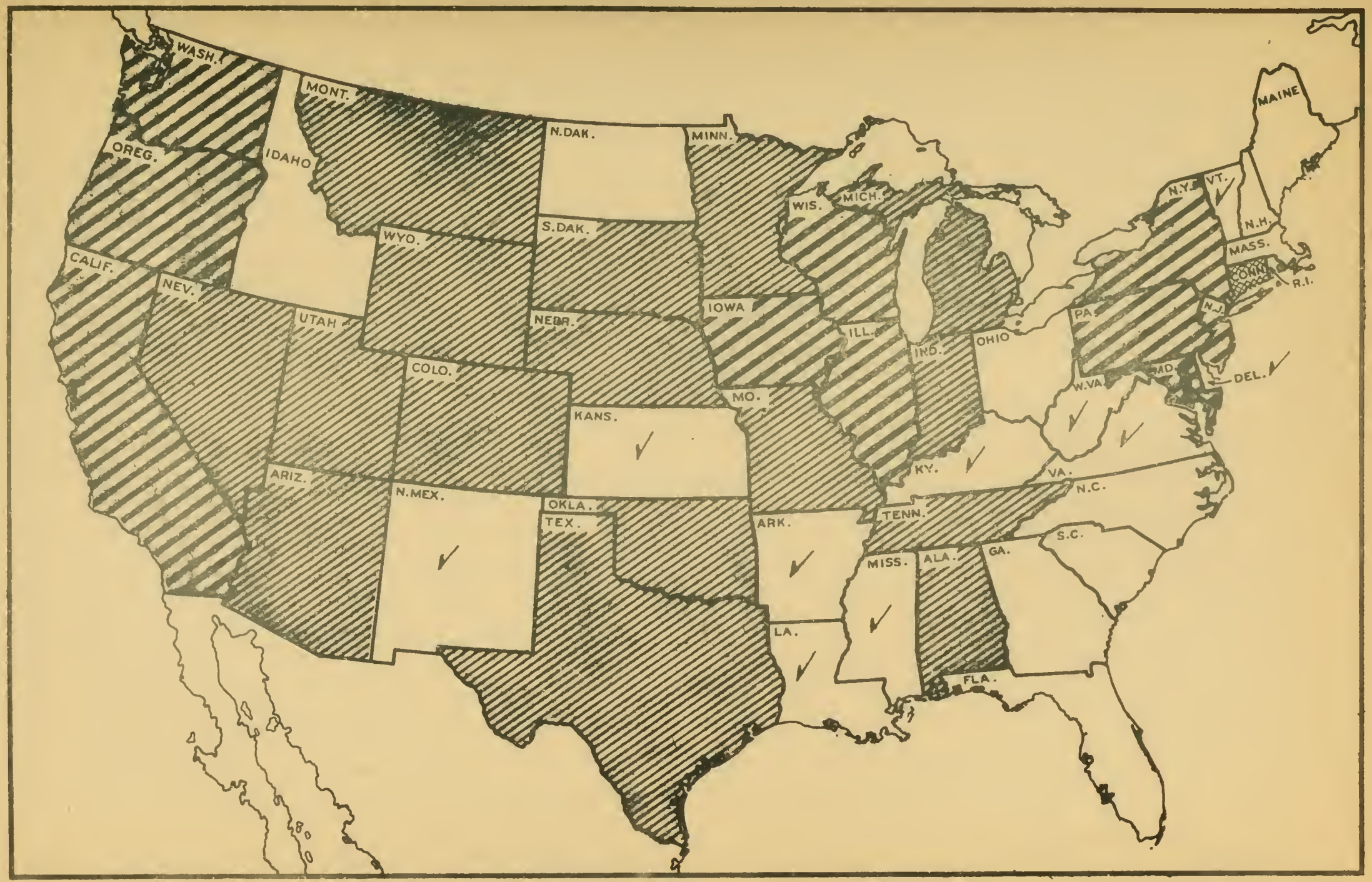
Retail prices should be studied in states now having no cost protection, in Connecticut, and in states with resale price maintenance. California must be given special attention because it has had the longest experience under a Fair Trade Law and now has, in addition, a loss limitation law. The results of the study will be directly useful in providing the economic background for legislative and administrative action on retailing in the coming year.

APPENDICES

APPENDIX A

STATE FAIR TRADE LEGISLATION IN THE UNITED STATES

AS OF OCT. 10, 1935



FAIR TRADE LAWS

RETAIL DRUG CONTROL LAW

FAIR TRADE BILLS WERE KILLED

✓ FAIR TRADE BILL TO BE PRESENTED AT NEXT LEGISLATURE

NO BILL

NRA
DIVISION OF REVIEW
STATISTICS SECTION
NO. 370

STATUS OF "FAIR TRADE" LEGISLATION

By States, as of Oct. 10. 1935

State	Date of Passage	Date Effective	Bill Pending	Bill Dead	Bill to be Presented	No Bill Presented
Alabama				x		
Arizona				x		
Arkansas					x	
California	Passed 1931 Amended - May, 1933	Amend. Eff. August 22, 1933				
Colorado				x		
Connecticut	Retail Drug Control Bill June 13:	(1935) July 1		x		
Delaware					x	
Florida						x
Georgia						x
Idaho						x
Illinois	July 8,1935	July 8,1935				
Indiana				x		
Iowa	May, 1935					
Kansas					x	
Kentucky					x	
Louisiana					x	
Maine						No Data
Maryland	May 17, '35					
Massachusetts						x
Michigan				x		
Minnesota				x*		

*Fitch Control Plan. See page 69

State	Date of Passage	Date Effective	Bill Pending	Bill Dead	Bill to be Presented	No bill Presented
Mississippi					x	
Missouri				x*		
Montana				x		
Nebraska				x		
Nevada				x		
New Hampshire						x
New Jersey	March 12, 1935	March 12, 1935				
New Mexico					x	
New York	May 17, 1935	May 17 1935				
North Carolina						x
North Dakota						x
Ohio						x
Oklahoma				x		
Oregon	March 13, 1935					
Pennsylvania	June,1935	JN.6,1935				
Rhode Island						x
South Carolina						No Data
South Dakota				x		
Tennessee				x		
Texas				x		
Utah				x		
Vermont					x	
Washington	March 25, 1935	March 25, 1935	EFFECTIVE UNTIL JULY, 1937			
Wisconsin	April,1935					
Wyoming				x		

STATISTICS OF ALL RETAIL ESTABLISHMENTS IN THE 10 STATES NOW HAVING FAIR TRADE LAWS AND THE 16 STATES IN WHICH FAIR TRADE ACTS WERE KILLED 3/

	For 10 States with Fair Trade Laws	For 16 3/ States in which Fair Trade Acts were killed
Per Cent of Retail Establishments in the U. S. 2/	44.93	24.99
Per Cent of all Retail Chain Establishments in the U. S.	46.58	24.08
Per Cent of Retail Dollar Sales for the U. S.	48.48	22.89
Per Cent of Chain Retail Dollar Sales for the U. S.	51.89	20.23
Chains as per cent of all Retail Establishments in the States considered	9.62	8.94
Chain Dollar Sales as per cent of Retail Sales in the States considered	26.98	22.28
Per Cent of Total United States Population 1/	40.01	26.60
Weighted Average Urban 4/ Population as per cent of Total Population for States considered	71.40	48.71

All Chains were 9.28% of all Retail Establishments in the United States
Sales of Chains were 25.21% of all Retail Sales in the United States

1/ Population Statistics are from the 1930 Census of Population

2/ All data other than the population figures are from the Census of American Business. Retail Distribution 1933.

3/ Connecticut was excluded because the Retail Drug Control Bill was enacted June 13, 1935.

4/ Urban population consists of all incorporated places of greater than 2,500 inhabitants plus those unincorporated townships and municipalities containing 10,000 or more inhabitants with a minimum density of 1,000 inhabitants per square mile. Fifteenth Census of the United States. Population Vol. 1. "Number and Distribution of Inhabitants," page 7.

APPENDIX B

TEXTS OF FAIR TRADE LAWS PASSED
UP TO JULY 15, 1935

California

An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name.

The People of the State of California do enact as follows:

SECTION 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the laws of any court.

SECTION 2. This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

SECTION 3. The following terms, as used in the act, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

SECTION 4. If any provision of this Act is declared unconstitutional, it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

California (cont.)

SECTION 5. This Act may be known and cited as the "Fair Trade Act."

Approved May 8, 1931
Effective August 14, 1931

AMENDMENT

An Act to add a new section to the "Fair Trade Act" to be number 1-1/2, relating to unfair competition.

The People of the State of California do enact as follows:

SECTION 1. A new section is hereby added to the "Fair Trade Act" to be numbered 1-1/2 and to read as follows:

SECTION 1-1/2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Approved, May 8, 1933
Effective, August 21, 1933

Illinois

An Act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: Provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1, of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Section 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Section 4. This Act may be known and cited as the "Fair Trade Act".

Senate Bill 598 Approved July 8, 1935.

9136

Iowa

An Act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. Subdivision 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Iowa by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity except as the price stipulated by the vendor.

(b) That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor, or by such vendee.

2. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discountinuing delivering such commodity.

(b) When the goods are damaged or deteriorated in quality and notice is given to the public thereof.

(c) By any officer acting under the orders of any court.

SECTION 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section one (1) of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

SECTION 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale price.

SECTION 4. The following terms as used in this Act, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

SECTION 5. If any provision of this Act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

SECTION 6. All acts or parts of Acts inconsistent herewith are hereby repealed.

Approved May 16, 1935

Maryland

An Act to add five (5) new sections to Article 83 of Bagby's Annotated Code of the Public Laws of Maryland, Edition of 1924, title "Sales and Notices," said new sections to bear the sub-title "Fair Trade Act," to follow immediately after Section 104, and to be known as Sections 105, 106, 107, 108, and 109, respectively, to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name.

Section 1. Be it enacted by the General Assembly of Maryland, That five (5) new sections, be, and the same are hereby, added to Article 83 of Bagby's Annotated Code of the Public General Laws of Maryland, Edition of 1924, title "Sales and Notices," to bear the sub-title "Fair Trade Act," to follow immediately after Section 104, and to be known as Sections 105, 106, 107, 108, and 109, respectively, said new sections to read as follows:

105. The following terms, as used in this Act, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

106. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Maryland by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

107. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 105, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Maryland (cont.)

108. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

109. This Act may be known and cited as the "Fair Trade Act."

Section 2. And be it further enacted, That if any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be effected thereby.

Approved, May 17, 1935

Chapter 212
Laws 1935

New Jersey

An Act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name.

Be it enacted by the Senate and the general assembly of the State of New Jersey.

1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears the trade-mark, brand, or the name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of New Jersey by reason of any of the following provisions which may be contained in such contract.

(a) That the buyer will not resell such commodity, except at the price stipulated by the vendor.

(b) That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodities may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality, and notice is given the public thereof.

(c) By any officer acting under orders of any court.

2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

3. This Act shall not apply to any contract or agreement between wholesalers or between producers or between retailers as to sale or resale prices.

4. The following terms, as used in this Act, are defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

New Jersey (cont.)

5. If any provision of this Act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions shall remain in full force and effect.

6. This Act shall take effect immediately.

Approved, March 12, 1935.

New York

An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Subdivision 1. No contracts relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of New York by reason of any of the following provisions which may be contained in such contract.

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(b) That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

2. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(c) By any officer acting under the orders of any court.

SECTION 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section one of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such a contract, is unfair competition and is actionable at the suit of any person damaged thereby.

SECTION 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

SECTION 4. The following terms, as used in this Act, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

New York (cont.)

SECTION 5. If any provision of this Act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

SECTION 6. This Act shall take effect immediately.

Signed about May 17, 1935

Chapter 976, New York
State Laws of 1935

Oregon

An Act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name; placing certain limitations for resale upon commodities and to repeal Chapter 311, Oregon Laws 1933. Be it enacted by the People of the State of Oregon.

SECTION 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears the trade-mark, brand or name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Oregon by reason of any of the following provisions which may be contained in such contract.

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodities may be resold without reference to such agreement in the following cases:

1. In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

SECTION 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this Act whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

SECTION 3. This Act shall not apply to any contract or agreement between producers or between wholesalers, or between retailers as to sale or resale prices.

SECTION 4. The following terms, as used in this Act, hereby are defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

Oregon (cont.)

SECTION 5. If any provision of this Act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

SECTION 6. This Act may be known and cited as the "Fair Trade Act."

SECTION 7. That Chapter 311 Oregon Laws, 1933 be and the same hereby is repealed.

Law Without Approval,
March 13, 1935.

Pennsylvania

An Act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand, or name.

SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met and it is hereby enacted by the authority of the same That no contract relating to the sale or resale of a commodity which bears or the label or content of which bears the trade-mark brand or the name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Pennsylvania by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(b) That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not in turn resell except at the price stipulated by such vendor or such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodities may be resold without reference to such agreement in the following cases:

(a) In closing out the owners stock for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality and notice is given the public thereof.

(c) By any officer acting under orders of any court or in the execution of any writ of distress.

SECTION 2. Wilfully and knowingly advertising offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1 of this Act whether the person so advertising offering for sale or selling is or is not a party to such contract is unfair competition and is actionable at the suit of any person damaged thereby:

SECTION 3. This Act shall not apply to any contract or agreement between wholesalers or between producers or between retailers as to sale or resale prices.

SECTION 4. The following terms as used in this Act are defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

Pennsylvania (cont.)

SECTION 5. If any provision of this Act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions shall remain in full force and effect.

SECTION 6. This Act shall become effective immediately upon its final enactment.

Signed June 6, 1935.

Session of 1935

H. F. 1976

Washington

An Act relating to the sale of certain articles and commodities, providing protection for trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles and commodities of standard quality under a distinguished trade-mark, brand or name, prescribing penalties, and declaring that this Act shall take effect immediately. Be it enacted by the Legislature of the State of Washington:

SECTION 1. The purpose of this Act is to assist in the establishment of fair business competition and the elimination of certain misleading and unsound business practices which have lowered wages and placed thousands of small dealers and shop-keepers in a precarious financial condition. It is enacted as a means of affording some relief to storekeepers and their employees during the prevalent economic depression, to assist in preventing bankruptcies with their incidental economic losses, and to enable such store-keepers to increase the wages of their employees in such a manner as will reflect an equitable adjustment to variations in the costs of living.

SECTION 2. The following terms, as used in this Act, hereby are defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

SECTION 3. No contract relating to the sale or resale of a commodity which bears the trade-mark, brand or name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any of the laws of the State of Washington by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity, except at the price stipulated by the vendor.

2. That the producer's vendee require in delivery from his vendee an agreement that his vendee will not, in turn, resell except at the price stipulated by the producer or producer's vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(c) By any officer acting under the orders of any court.

Washington (Cont'd)

SECTION 4. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 3 of this Act whether the person so advertising, offering for sale or selling is or is not a party to such contract shall constitute unfair competition which may be enjoined by suit in equity at the instance of any person injured thereby, or subject the offender to an action at law for damages, brought by any person injured thereby.

SECTION 5. None of the provisions of this Act shall be construed to authorize or apply to any contract or agreement between producers, or between wholesalers, or between retailers as to sale or resale prices.

SECTION 6. If any provision of this Act is adjudged to be unconstitutional or void, such adjudication shall not affect the remaining portions of this Act, but all such remaining portions shall remain in full force and effect.

SECTION 7. This Act is necessary for the immediate preservation of the public peace, wealth and safety, and shall take effect immediately and shall continue in effect until the first day of July, 1937.

Approved by the GOVERNOR

March 25, 1935

Chapter 177 Laws of 1935.

Wisconsin

An Act to create Section 133.185 and Sections 133.25 to 133.27; to amend Sections 133.19 and 133.20 of the Statutes, relating to fair trade practices and unfair discriminations, and providing a penalty. The People of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. Four new sections are added to the Statutes to read: 133.185 Secret Rebates; Unfair Trade Practice; Prohibited; Penalty. (1) The secret payment or allowance of rebates, refunds, commissions or unearned discounts, whether in the form of money or otherwise, or the secret extension to certain purchasers of special services or privileges not extended to all purchasers purchasing upon like terms and conditions, such payment allowance or extension injuring or tending to injure a competitor or destroying or tending to destroy competition, is an unfair trade practice and is prohibited.

(2) Any person, firm or corporation violating any of the provisions of Subsection (1) shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars or by imprisonment in the county jail for not to exceed six months, or by both such fine and imprisonment.

133.25 Certain Contracts Not in Restraint of Trade. Exceptions.

(1) This section may be cited as the "Fair Trade Act."

(2) As used in this section, "producer" means grower, baker, maker, manufacturer, and "commodity" means any subject of commerce.

(3) Except as provided in Subsections (4) and (6), no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed a contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce by reason of any of the following provisions contained in such contract:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(b) That the vendee or producer shall require that any person to whom delivery of a commodity is made for the purpose of resale shall agree that the latter will not, in turn, resell except at the price stipulated by the vendor, or vendee.

(4) Every contract containing the provisions referred to in Subsection (3) shall include the provision that such commodity may be resold without reference to such contract in the following cases:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing delivering any such commodity.

Wisconsin (cont.)

(b) When the foods are damaged or deteriorated in quality, and notice is given to the public thereof.

(5) Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract referred to in Subsection (3), whether or not the person so advertising, offering for sale or selling is a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

(6) This section does not apply to any contract between producers, or between wholesalers or between retailers as to sale or resale prices.

(7) (a) Upon complaint of any person that any contract containing the provisions referred to in Subsection (3) is unfair and unreasonable as to the minimum resale price therein stipulated, the Department of Agriculture and Markets may in its discretion serve by registered mail upon the parties to said contract notice of the time and place for a hearing on said complaint, at which hearing said parties shall show cause why the said contract should not be set aside. If upon such hearing the Department of Agriculture and Markets shall find that such contract is unfair and unreasonable as to its minimum resale price provisions, said Department may by special order declare such contract to be in restraint of trade.

(b) The Department of Agriculture and Markets shall assess the costs of such proceeding against such contracting parties in case it finds such contract unfair and unreasonable and against the complainant if it finds such contract fair and reasonable, provided, however, that the costs against any one complainant in any one complaint shall not exceed five dollars.

(c) Decisions in such cases shall be subject to judicial review as provided in Section 99.27.

(8) This section shall not apply to any cooperative society or association not organized for profit.

133.26 Certain Contracts Declared Illegal.

Any contract, express or implied, entered into in violation of any of the provisions of Sections 133.17, 133.18, 133.185 or 133.186, is an illegal contract and no recovery shall be had thereon.

133.27 Legislative Intent Declared.

The intent of Sections 133.17 to 133.186 and Section 133.25 is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory practices under which fair and honest competition is destroyed or prevented. Said sections shall be liberally construed so that their beneficent purposes may be observed.

SECTION 2. Sections 133.19 and 133.20 of the Statutes are amended to read: 133.19. The attorney general shall institute, manage, control, and

Wisconsin (cont.)

direct, by himself his deputy or any of his assistants, in the proper county, all prosecutions for violations of Sections 133.17 **** to 133.186 and for such purpose shall have and exercise all powers conferred upon district attorneys in such cases. It shall be the duty of the district attorney in the county in which any such prosecution may be instituted or pending to cooperate with and assist the attorney general in such prosecution.

133.20 If complaint shall be made to the attorney general that any corporation is guilty of unfair discrimination, as defined by the provisions of - - - Sections 133.17 to 133.186, he shall investigate such complaint and for that purpose he may subpoena witnesses, administer oaths, take testimony and require the production of books or other documents, and, if in his opinion sufficient grounds exist therefor, he may prosecute an action in the name of the State in the proper court to annul the charter or revoke the permit of such corporation, as the case may be, and to permanently enjoin such corporation from doing business in this State, and if in such action the court shall find that such corporation is guilty of unfair discriminations, as defined by the provisions of said - - - Sections 133.17 - - - 133.186, such court shall annul the charter or revoke the permit of such corporation, and may permanently enjoin it from transacting business in this State.

SECTION 3. If any of this Act or the application thereof to any person or circumstance is held unconstitutional, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

SECTION 4. This Act shall take effect upon passage and publication.

Approved May 1, 1935
Published May 2, 1935

Chapter 52, Laws of 1935

APPENDIX C

TEXT OF REPEALED FAIR TRADE LAW OF OREGON

An Act to permit producers to place certain limitations for resale upon any commodity received under a contract of sale containing such provisions, sold by the vendee or any other person obtaining the same for the purpose of resale, the exceptions to this act and procedure thereto.

Be it enacted by the People of the State of Oregon:

SECTION 1. This act shall be known and cited as the "fair trade act."

SECTION 2. It is the declared policy of this act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguishing trade-mark.

SECTION 3. As used in this act:

(1) The term "producer" means grower, packer, maker, manufacturer.

(2) The term "commodity" means any subject of commerce.

SECTION 4. No contract between producer and retailer relating to the sale or resale of a commodity which bears the trade-mark of the producer, or the owner of such commodity, which is in fair and open competition with commodities of the same general class produced by others and not in restraint of trade, shall be deemed unlawful as against the public policy of the State of Oregon by reason of any of the following provisions contained in such contract:

(1) That the vendee will not resell such commodity except at or in excess of the minimum price, or prices stated and mutually agreed to in such contracts.

(2) That the vendee or producer require any dealer to whom he may resell such commodity to agree that he will, in turn, resell at or in excess of the minimum price, or prices, stated for such resale, as mutually agreed to in such contracts.

Provided, that the minimum price or prices stated and mutually agreed to in any such contract, shall be uniform to all vendees in like circumstances, differing only as to the quantity of such commodity sold, the point of delivery and the manner of settlement.

SECTION 5. Any such agreement in a contract relating to intrastate commerce involving such commodity shall be deemed to contain the implied conditions that such commodity may be resold without exception to such agreement as follows:

(1) In closing out owner's stock for the purpose of discontinuing dealing in such commodity; or

Text of Repealed Fair Trade Law of Oregon (Cont.)

(2) Disposing of such commodity when damaged, deteriorated or soiled, provided that prominent notice is given to the public of such fact; or

(3) By a receiver, trustee, or other officer acting under the orders of any court, or an assignee making sales in bulk for the benefit of the creditors.

SECTION 6. Advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 4 of this act, or affected by Section 5 hereto, is unfair competition and is actionable in a suit of the producer; provided the producer shall, at the same time, bring action against all vendees of such commodity doing business within the county in which such action is brought, for damages suffered by him by reason of such unfair competition or flowing from the vendee's breach of contract, and his failure so to do shall constitute a bar to such action.

SECTION 7. If any provision of this act is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the act and the applicability of such provision to other persons or circumstances shall not be affected thereby.

Filed in the office of the Secretary of State, March 9, 1933.

Chapter 311, Oregon Laws, 1933

Repealed in 1935, replaced by new Fair Trade Law.

APPENDIX D

THE NEW JERSEY UNFAIR COMPETITION LAW

An Act to prevent unfair competition and unfair trade practices.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

SECTION 1. It shall be unlawful for any merchant, firm or corporation, (for the purpose of attracting trade for other goods,) 1/ to appropriate for his or their own use 2/ a name, brand, trade-mark, reputation or good will of any maker in whoee product said merchant, firm, or corporation deals, or to discriminate against the same by depreciating the value of such products in the public mind, or by misrepresentation as to the value or quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever, except in the cases where said goods do not carry any notice prohibiting such practice, and excepting in case a receiver's sale, or a sale by a concern going out of business. (The notice prohibiting such practice shall contain a copy of this section and forbid the violation of any of its provisions.) 3/

SECTION 2. Any person, firm, or corporation violating this Act shall be liable at the suit of the maker of such branded or trade-marked goods, or any other injured person, to an injunction against such practices, and shall be liable to such suit for all damages directly or indirectly caused to the maker by such practices, which said damages may be increased threefold, in the discretion of the court.

SECTION 3. This law shall become effective immediately.

SECTION 225-1, 2, and 3. Compiled Laws of New Jersey, 1911-1924.

1/ The phrase enclosed in parentheses appeared in the law as passed April 1, 1913. (Chap. 210 Laws of New Jersey for 1913) On April 26, 1915, the statute was amended by the deletion of this phrase and by the addition of the sentence enclosed in parentheses.

2/ In the 1916 amendment the word "ends" of the 1913 Law, was replaced by the word, "use".

3/ The sentence enclosed in parentheses was added to the 1913 Law by the amendment of April 26, 1915, (Chap. 376 Laws of New Jersey for 1915), and deleted March 16, 1916 (Chap. 107 Laws of New Jersey for 1916). The law, as it now stands, is the one quoted above, after the portions enclosed in parentheses have been deleted from the text.

CALIFORNIA UNFAIR PRACTICE ACT

An act to amend an act entitled "An act relating to unfair competition and discrimination, making certain unfair and discriminatory practices unlawful, defining the duties of the Attorney General in regard thereto, declaring certain contracts illegal and forbidding recovery thereon, providing for actions to enjoin unfair competition and discrimination and to recover damages therefor, making the violation of the provisions of this act a misdemeanor and providing penalties," approved June 10, 1913, relating to unfair discriminations, and declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

Section 1. The act cited in the title hereof is hereby amended to read as follows:

Section 1. It shall be unlawful for any person, firm, or corporation, doing business in the State of California and engaged in the production, manufacture, distribution or sale of any commodity, or product, or service or output of a service trade, of general use or consumption, or the product or service of any public utility, with the intent to destroy the competition of any regular established dealer in such commodity, product or service, or to prevent the competition of any person, firm, private corporation, or municipal or other public corporation, who or which in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this State, by selling or furnishing such commodity, product or service at a lower rate in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another after making allowance for difference, if any, in the grade or quality, quantity and in the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture, if a manufactured product or commodity. Motion picture films when delivered under a lease to motion picture houses shall not be deemed to be a commodity or product of general use, or consumption, under this act. This act shall not be construed to prohibit the meeting in good faith of a competitive rate, or to prevent a reasonable classification of service by public utilities for the purpose of establishing rates. The inhibition hereof against locality discrimination shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this act.

Section 2. Any person who, either as director, officer or agent of any firm or corporation or as agent of any person, violating the provisions of this act, assists or aids, directly or indirectly, in such violation shall be responsible therefor equally with the person, firm or corporation for whom or which he acts.

In the prosecution of any person, as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts.

California Unfair Practice Act (cont.)

Section 3. It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this State, to sell, offer for sale or advertise for sale any article or product, or service or output of a service trade, at less than the cost thereof to such vendor, or give, offer to give, or advertise the intent to give vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition, and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in section 11 of this act for any such act.

The term "cost" as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution "cost" shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

The "cost of doing business" or "overhead expense" is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising.

Section 4. In establishing the cost of a given article or product to the distributor and vendor, the invoice cost of said article or product purchased at a forced, bankrupt, closeout sale, or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of date of said sale of said article or product replaced through the ordinary channels of trade, unless said article or product is kept separate from goods purchased in the ordinary channels of trade and unless said article or product is advertised and sold as merchandise purchased at a forced, bankrupt, closeout sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased, and the quantity of such merchandise to be sold or offered for sale.

Section 5. In any injunction proceeding or in the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts. Where a particular trade or industry, of which the person, firm or corporation complained against a member has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm or corporation complained against within the provisions of this act.

Section 6. The provisions of sections 3, 4 and 5 shall apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof:

California Unfair Practice Act (cont.)

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

(c) By an officer acting under the orders of any courts;

(d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, or service or output of a service trade, in the same locality or trade area.

Any person, firm or corporation who performs work upon, renovates, alters or improves any personal property belonging to another person, firm or corporation, shall be construed to be a vendor within the meaning of this act.

Section 7. The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, firm, partnership, corporation, or association resorting to such trade practice shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in Section 11 of this act.

Section 8. Upon the third violation of any of the provisions of sections 1 to 7, inclusive, of this act by any corporation, it shall be the duty of the Attorney General to institute proper suits for quo warranto proceedings in any court of competent jurisdiction for the forfeiture of its charter, rights, franchises or privileges and powers exercised by such corporation, and to permanently enjoin it from transacting business in this State. If in such action the court shall find that such corporation is violating or has violated any of the provisions of sections 1 to 7, inclusive, of this act, it must enjoin said corporation from doing business in this State permanently or for such time as the court shall order, or must annul the charter, or revoke the franchise of such corporation.

Section 9. Any contract, express or implied, made by any person, firm, or corporation in violation of any of the provisions of sections 1 to 7, inclusive, of this act is declared to be an illegal contract and no recovery thereon shall be had.

Section 10. Any person, firm, private corporation or municipal or other public corporation, or trade association, may maintain an action to enjoin a continuance of any act or acts in violation of sections 1 to 7, inclusive, of this act and, if injured thereby, for the recovery of damages. If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of sections 1 to 7, inclusive, of this act, it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunctive relief, the plaintiff in said action shall be entitled to recover from the defendant three times the amount of the actual damages, if any, sustained.

California Unfair Practice Act (cont.)

Any defendant in an action brought under the provisions of this section may be required to testify under the provisions of sections 2021, 2031 and 2055 of the Code of Civil Procedure of this State, in addition the books and records of any such defendant may be brought into court and introduced, by reference, into evidence; provided, however, that no information so obtained may be used against the defendant as a basis for a misdemeanor prosecution under the provisions of sections 1 to 7, inclusive, and 11 of this act.

Section 11. Any person, firm, or corporation, whether as principal, agent, officer or director, for himself, or itself, or for another person, or for any firm or corporation, or any corporation, who or which shall violate any of the provisions of sections 1 to 7, inclusive, of this act, is guilty of a misdeameanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred ($100.00) dollars nor more than one thousand ($1,000.00) dollars, or by imprisonment not exceeding six months or by both said fine and imprisonment, in the discretion of the court.

Section 12. If any section, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of the act. The Legislature hereby declares that it would have passed this act, and each section, sentence, clause or phrase thereof, irrespective of the fact that any one or more other sections, sentences, clauses or phrases be declared unconstitutional. The remedies herein prescribed are cumulative and in addition to the remedies prescribed to the Public Utilities Act for discriminations by public utilities. If any conflict shall arise between this act and the Public Utilities Act, the latter shall prevail.

Section 13. The Legislature declares that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally construed that its beneficial purposes may be subserved.

Section 14. This act shall be known and designated as the "Unfair Practices Act."

Section 15. This act is hereby declared to be an urgency measure necessary for the immediate preservation of the public peace, health, and safety, within the meaning of section 1 of Article IV of the Constitution, and shall therefore go into immediate effect. The facts constituting the necessity are as follows:

The sale at less than cost of goods obtained at forced, bankrupted, close out, and other sales outside of the ordinary channels of trade is destroying healthy competition and thereby forestalling recovery. If such practices are not immediately stopped many more businesses will be forced into bankruptcy, thus increasing the prevailing condition of depression. In order to prevent such occurrances it is necessary that this act go into effect immediately.

Approved July 15, 1935

Chapter 477 Laws of 1935
Assembly Bill 1870
9136

RETAIL DRUG CONTROL ACT

Connecticut

An Act Providing for the Prevention of the Sale of Inferior Drug and Cosmetics Merchandise:

Be it enacted by the Senate and House of Representatives in General Assembly convened:

SECTION 1. This act may be cited as the "Retail Drug Control Act." The following terms shall have the following meanings, when used in this act, unless the context otherwise indicated: (a) "Retail drug trade" shall mean the selling to the consumer, not for the purpose of resale, of any form of drugs, medicines, cosmetics, toilet preparations, drug sundries or allied articles, but shall not include the dispensing of drugs, medicines and medical supplies by a physician, dentist, surgeon, or veterinary in the legitimate practice of his profession; (b) "drug retailers" shall mean any individual, firm or corporation engaged wholly or partially in the retail drug trade; (c) "retail drug establishment" shall mean any store or department of a store engaged in the retail drug trade; (d) "drug" shall mean any substance or preparation, except soaps, intended for external or internal use in the cure, mitigation, treatment, remedy or prevention of disease or ailment in man or any other animal, and any substance or preparation intended to affect the structure or function of the body of man or any other animal, not including food but including medicinal or quasi-medicinal preparations; (e) "cosmetics" and "toilet preparations" shall mean toilet articles and perfumes, toilet waters, face powders, creams, lotions, rouges, shaving creams, dentifrices, bath salts and all other similar preparations and substances, except soaps, designed and intended for application to the person for the purpose of cleansing, improving or changing in any way the appearance of the person or of refreshing or preserving the person; (f) "drug sundries" shall mean such articles as are used in conjunction with, but not included in, drugs, cosmetics or toilet preparations.

SECTION 2. (a) No drug retailer shall use advertising whether printed, radio or display or of any other nature, which is intentionally inaccurate in any material particular or misrepresents merchandise, in respect to its use, trade-mark, grade, quality, quantity, size, origin, material, content or preparation; and no drug retailer shall use advertising or selling methods which tend to deceive or mislead the customer. (b) No drug retailer shall use advertising which refers inaccurately in any material particular to any competitor or his merchandise, prices, values, credit terms, policies or services. (c) No drug retailer shall use advertising which lays claim to a policy or a continuing practice of generally underselling competitors. (d) No drug retailer shall secretly give anything of value to a customer or to the employee or agent of a customer for the purpose of influencing a sale or, in furtherance of a sale, render a bill or statement of account to the employee, agent or

Connecticut (Cont.)

customer which is inaccurate in any material particular. (e) No drug retailer shall sell or offer for sale any merchandise upon a condition which involves a lottery, gamble, or other element of chance. (f) No drug retailer shall permit any demonstrator or sales employee whose salary is wholly or partially paid by a manufacturer or distributor to work in his establishment unless such demonstrator or sales employee is clearly and openly identified as the agent of such manufacturer or distributor.

SECTION 3. No drug retailer shall sell any drugs, medicines, cosmetics, toilet preparations or drug sundries at a price below the manufacturer's wholesale list price per dozen; nor, in the case of biologicals or other of the above mentioned products which are not customarily sold in dozens or greater lots, sell such products at less than the manufacturer's wholesale list price per unit. Notwithstanding the provisions of the preceding sentence, any drug retailer may sell at less than the prices specified above, imperfect or actually damaged merchandise or bona fide discontinued lines of merchandise, if advertised, marked and sold as such; merchandise sold upon the complete final liquidation of any business; merchandise sold or donated for charitable purposes or to unemployment relief agencies, and drugs or drug sundries sold to physicians, dentists, veterinarians or hospitals, but not for the purposes of resale by them.

SECTION 4. Any person responsible for a wilfull violation of the provisions of this act shall be fined not more than $500.

Passed June 13, 1935

APPENDIX E

THE FITCH PLAN

The "Fitch Plan" proposed as a "Fair Trade Act" in Missouri and Minnesota, and voted down, is a plan under which contracts would not be necessary. Filing price lists with the Secretary of State of the State passing such an Act would constitute legal notice on all resellers. This proposed Act provides for damage suit by the manufacturer only.

An Act to Prevent Unfair Competition and Unfair Trade Practices

1. It shall be unlawful for any merchant, firm, association or corporation to appropriate for his or their own use a name, brand, trade-mark, reputation or good will of any maker in whose product said merchant, firm or corporation deals, or to discriminate against the same by depreciating the value of such product in the public mind, or by misrepresentation as to value or quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever, except in cases where said goods or products do not carry any notice prohibiting such practice, and except in case of a receiver's sale or a sale by a concern going out of business.

2. Every person, firm, association or corporation that has heretofore adopted or shall hereinafter adopt for their protection any label, trade-mark, brand or form of advertisement, and who shall have filed the same for record in the office of the Secretary of State, as provided by law in this State, may file with such label, trade-mark, brand or form of advertisement, a notice of the standard retail price at which any article or articles sold under such label, trade-mark, brand or form of advertisement shall be sold in the legitimate channels of retail trade. The filing of such notice shall constitute constructive notice to all persons of the standard retail price of such article or articles and the Secretary of State shall receive a fee of one dollar for the filing of such notice.

3. Any person, firm, association or corporation violating this Act shall be liable at the suit of the manufacturer of such branded, labeled, trade-marked or advertised goods, or any other injured person, to an injunction against such practice, and shall be liable in such suit for all damages directly or indirectly caused to the makers by such practices, which said damages may be increased threefold in the discretion of the court.

4. "Should any person, firm, association or corporation complying with the foregoing provisions of this Act, desire to change the standard retail price of any article or articles sold under such brand, label, trade-mark or form of advertisement, notice of such change shall be filed in the office of the Secretary of State in the same manner and upon payment in amount of some fees as in the case of the original filing of such notice."

APPENDIX F

THREE FORMS OF CONTRACT NOW IN USE UNDER THE FAIR TRADE LAWS

Proponents of Fair Trade Legislation appear to be proceeding cautiously in bringing suit under the laws, presumably to avoid arousing resentment of the public and the trade. No case under the California law, the earliest to be passed, has yet been brought to the Supreme Court. The three appended forms of contract are now in use.

Suggested Contract Form

CONTRACT BETWEEN MANUFACTURER AND RETAILER UNDER CALIFORNIA "FAIR TRADE ACT"

THIS AGREEMENT made this first day of September, 1933, at Los Angeles, California, by and between the GOLDEN SEAL COMPANY, of Oakland, a California corporation hereinafter called the Manufacturer, and JIM BLACK DRUG COMPANY, of Los Angeles, California, hereinafter called the Retailer, WITNESSETH:

THAT WHEREAS the Manufacturer makes and distributes under its trade mark "GOLDEN SEAL" the following products which are in fair and open competition with products of the same general class produced by others, to-wit: Golden Seal Tonic, Golden Seal Corrective, and Golden Seal Laxative Tablets, and the Retailer purchases said products either from the Manufacturer or one or more of the various wholesale druggists within this state and resells same from his retail drug store within this state, and,

THAT WHEREAS said products are sold to all retail druggists in this state at uniform prices and on equal terms and discounts based on known sliding scale quantity lots or deals, and similar contracts hereto are being executed between the Manufacturer and other California Retailers, and

THAT WHEREAS the Manufacturer and the Retailer are mutually desirous of securing the benefits of the California Fair Trade Act,

NOW, THEREFORE, it is agreed that the Retailer shall sell said products only in California and to consumers only and will not advertise, offer for sale or sell any of same, either directly or indirectly, at less than the following stipulated prices:

Golden Seal Tonic	$1.00 per bottle
Golden Seal Corrective	$1.00 per bottle
Golden Seal Laxative Tablets	$0.50 per package

THE MANUFACTURER reserves the right to change said retail prices, but said change shall be effected by written amendment to this contract as well as to all similar contracts in effect within this state, which written amendments shall be uniform and mailed contemporaneously to every contracting Retailer in California at least ten days before the effective date of the change in price to be stated in said amendment. The written amendment shall be executed by the Manufacturer and submitted to the Retailer in duplicate, the Retailer in turn executing said amendment, attaching one copy thereof to this contract, and returning the other copy to the Manufacturer.

VIOLATION OF THIS CONTRACT shall constitute unfair competition and will render the guilty party liable for damages at the suit of any person injured or damaged thereby, and in addition thereto will entitle said injured person to injunctive relief. In the event that in any suit brought hereunder for damages by reason of a breach hereof, by either party hereto against the other, the Court should hold or find that from the nature of the case it would be impracticable or extremely difficult to fix the actual damage, then in that event it is hereby agreed that $25.00 shall be presumed to be the amount of damage sustained by reason of each separate breach hereof.

THIS CONTRACT shall be effective only within the state of California, and shall not apply to interstate transaction.

CANCELLATION of this contract may be effected by either party by giving a ten day written notice of cancellation to the other party.

Manufacturer: Golden Seal Company
By: John Jones, Pres.

Retailer: Jim Black Drug Company
By: Jim Black, Prop.

TEXT OF MCKESSON AND ROBBINS PRICE CONTRACT
UNDER THE CALIFORNIA STATE FAIR TRADE ACT

Instructions

(1) Please carefully fill out the blanks above the word "Witnesseth."

(2) Then kindly sign the original, attaching your store label if you use one.

(3) Send the original to McKesson and Robbins, Incorporated, 919 Front Street, Sacramento. McKesson and Robbins, Incorporated, has executed this contract by having its name printed at the end, subject to receipt by it at said address of the original executed by the Retailer. The copy is for your records.

McKesson and Robbins, Incorporated,
Retail Sales Contract

For merchandise bearing the trade-mark, brand, or name of the producer or owner and distributed by McKesson and Robbins, Incorporated, in conformity with the Fair Trade Act of the State of California and operative on transactions within the state of California only.

THIS AGREEMENT made and entered into this .....day of ..193.. by and between McKesson and Robbins, Incorporated, a corporation, hereinafter called the Wholesaler, and .....
.....
Individual or Firm Name
of .....
Street Address
.....California
City
herein called the Retailer.

Witnesseth

Whereas (a) Wholesaler is engaged in the distribution to retailers in California of various commodities of standard quality which bear the trade-marks, brands or names of their producers or owners (b) said commodities are in fair and open competition with other commodities of the same general class produced by others (c) Wholesaler maintains stock of said commodities within the state of California for sale and distribution therein; and (d) Retailer is engaged in the retail sale and distribution of such commodities within the state of California; and Whereas, Wholesaler and Retailer mutually desire to avail themselves and the public of the provisions and protection of the Fair Trade Act of California as enacted in 1931 and enlarged in 1933.

NOW, THEREFORE, in consideration of the premises, the mutual promises herein contained, and for other considerations, the parties hereto hereby agree as follows:

1. Wherever the term "Commodity" or the term "Commodities" is used in this agreement, the same shall be construed to mean any subject of commerce which bears the trade-mark, brand or name of the producer or owner thereof and which is fair and open competition with commodities of the same general class

produced by others, including, without limiting the generality of the foregoing, all commodities bearing trade-marks, brands or names of wholesaler.

2. Retailer will not, within the State of California, advertise, offer for sale, sell or resell any commodities which bear, or the labels or containers of which bear, the trade-marks, brands or names of their respective producers or owners at prices less than those set forth in retail price lists which have been, or herafter may, be, furnished to Retailer by Wholesaler. All such price lists shall expressly and plainly indicate that the commodities and prices listed are within the terms of this contract.

3. Wholesaler reserves the right to change any and all such price lists at any time (and from time to time) and Wholesaler will make reasonable efforts to notify Retailer promptly of changes. All changes in such price lists shall immediately upon being made, constitute the minimum retail prices referred to in Paragraph 2. Wholesaler's latest price lists are (and all changes thereof, as and when made will be) available to Retailer at all Wholesaler's offices. Retailer's ignorance of retail price changes shall not excuse Retailer from any breach of this agreement.

4. Retailer will not sell said commodities or any of them, to any person except bona fide retail consumers, nor will retailer assist any third person, firm or corporation in obtaining any of said commodities for purposes of resal

5. The giving by Retailer of any article of value in connection with the sale of any of said commodities or the making of any concession in connection with the sale of any of said commodities, without the prior written authorization of Wholesaler, shall constitute a breach of this agreement with exactly the same effect as if Retailer violated the provisions of Paragraph 2 hereof.

6. In the event (a) of closing out Retailer's stock for the purpose of discontinuing delivery of any of said commodities or (b) that said commodities in Retailer's hands are damaged or deteriorated in quality, Retailer shall, before offering any of said commodities for sale at prices less than the said minimum retail prices, first offer to sell such commodities to Wholesaler at which Wholesaler is then selling such commodities to Retailers generally in the State of California. In any event, in the case of Retailer's sale of any of said commodities which are being closed out or are damaged or deteriorated in quality, Retailer shall give explicit notice to all purchasers that such is the case, and such notice shall be part of all advertising and counter-displays referring to such sales.

7. The parties hereto recognize and agree that it is impossible to determine the actual damage which will result to Wholesaler from sales made by Retailer in contravention of the terms of this agreement and they therefore agree that Retailer shall pay to Wholesaler, as liquidated damages, the sum of Twenty-five Dollars ($25,00) for each sale made by Retailer in violation of any provision of this agreement. If, and as often as Wholesaler shall institute any proceeding or action in any court against Retailer for any breach of this agreement, Retailer agrees, in addition to all court costs, to pay Wholesaler a reasonable attorney's fee. It is further agreed that, in addition to other legal rights and remedies, Wholesaler shall be entitled to injunctive relief against any and all actual or threatened breaches of this agreement.

8. Both parties agree that this contract applies only to transactions within the territorial boundaries of the State of California. However, both parties further agree that neither shall attempt to do indirectly or by means of any subterfuge, anything contrary to the letter and spirit of this contract.

9. It is the agreement and intention of the parties hereto that, if any provision or part of this agreement shall be held invalid, the remainder of this agreement shall nevertheless be deemed valid and binding upon the parties. No change in this printed form of contract shall be binding.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year first above written.

McKesson and Robbins, Incorporated,
Wholesaler

Signed.....
Retailer

(If Retailer is a Corporation affix seal here)

By.....
Designate position of person actually siging

Model Omnibus Fair Trade Contract,
As Suggested by Washington State
Pharmaceutical Association

This contract has been suggested as a model one for wholesalers to make with retailers in order to operate under the Washington Fair Trade Act. It was prepared by the Washington State Pharmaceutical Association.

The contract varies from those issued by wholesalers in California, in that it refers to a previous contract made with a manufacturer and requires that minimum prices be filed with the state pharmaceutical association.

The Model Contract follows:

John Doe Company of Seattle, party of the first part hereinafter referred to as wholesaler, and Richard Roe, of Seattle, party of the second part, hereinafter referred to as retailer, hereby agree as follows:

I. THIS AGREEMENT is made pursuant to the provisions of Chapter 177, Laws of 1935, of the State of Washington, known as the "Fair Trade Act" and the wholesaler is a "buyer" as referred to in subdivision 1 of Section 3 of said Act and is a "producer's vendee" as referred to in Subdivision 2 of said Section 3, and this agreement is made pursuant to and within the intent of said Section 3, the retailer being a "vendee of the producer's vendee."

II. If any clause or provision of this agreement shall be adjudged void or illegal by a court of competent jurisdiction the remainder of the agreement shall remain in full force and effect so far as may be, to carry out the intent hereof.

III. The wholesaler has heretofore entered into a contract with John Jones Tooth Paste Company, of New York City, a "producer" as referred to in the said Act, in which contract wholesaler agreed not to resell any commodity of said producer bearing the trade-mark, brand or name of said producer and which is in fair and open competition with commodities of the same general class produced by others, to any vendee of the wholesaler without requiring of such vendee, in turn, an agreement that no such commodity shall be sold for less than the price stipulated by the producer.

IV. The commodities to be governed by this agreement shall be: First: Those contained in the "original Wholesale and Retail Price List" of the said producer, attached to and made a part of this agreement. Second: Those which may hereafter be brought under the terms hereof by the producer and which, from time to time, may be contained in lists furnished to the Retailer by the producer or the Wholesaler.

V. The Retailer agrees that he will not resell any of such commodities except at the price or prices stipulated by said producer.

VI. Modifications in such price lists shall be made only in the manner hereinafter provided.

VII. Wholesaler agrees to immediately file with Washington State Pharmaceutical Association a correct copy of this agreement, of the said

Original Price List, of all additional price lists and of all increases, decreases or withdrawals, and no modification in any list shall be effective until the lapse of ..... days after notice thereof shall have been mailed or telegraphed to such Association and to the Retailer.

VIII. In case the producer or the Wholesaler shall request such Association to give publicity to such price lists or modifications thereof such producer or the Wholesaler shall bear the expense thereof.

Prices Filed with the Association

IX. The Wholesaler further agrees that he will, with the original price list, file with said Association a Complete Schedule of Terms, which shall provide for all discounts of whatever nature as may be allowed, whether "cash discounts," "trade discounts," "quantity discounts" or otherwise, and all conditions, terms and discounts shall be uniform within the State of Washington, and no discrimination or advantage of whatsoever nature shall be allowed to any person, firm or corporation, except that this agreement shall not apply to transactions between wholesalers, jobbers, exclusive sales agents or others who shall not sell at retail.

X. The wholesaler may terminate this Contract at any time upon ..... days notice by registered mail or telegram to Washington State Pharmaceutical Association and to the Retailer, party of the second part.

XI. Any commodity may be resold without reference to this agreement in the following cases: (a) In closing out the owner's stock for the purpose of discontinuing any such commodity; in such cases the Retailer shall, at least forty-eight hours prior to such sale or the appearance of any offer or advertisement thereof, file with Washington State Pharmaceutical Association a written notice of such discontinuance, and the Retailer shall not within one year thereafter, resume the sale of such commodity; (b) When the goods are damaged or deteriorated in quality and notice is given to the public thereof; (c) By any officer acting under orders of any court.

XII. Unless already in effect at the date of this agreement, prices contained in the "Original Price Lists" shall become effective, May 15, 1935.

APPENDIX G

Appendix_____

H. R. 13305 - 63: 2 -- Mr. Stevens -- Feb. 12, 1914

A Bill

To prevent discrimination in prices and to provide for publicity of prices to dealers and to the public.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any contract for the sale of articles of commerce to any dealer, wholesale or retail, by any producer, grower, manufacturer, or owner thereof, under trade-mark or special brand, hereinafter referred to as the "vendor", it shall be lawful for such vendor, whenever the contract constitutes a transaction of commerce among the several States, or with foreign nations, or in any Territory of the United States, or in the District of Columbia, or between any such Territory and another, or between any such Territory or Territories and any States or the District of Columbia, or with a foreign nation or nations, or between the District of Columbia and any State or States or a foreign nation or nations, to prescribe the sole, uniform price at which each article covered by such contract may be resold; Provided, That the following conditions are complied with:

(A) Such vendor shall not have any monopoly or control of the market for articles belonging to the same general class of merchandise as such article or articles of commerce as shall be covered by such contract of sale; nor shall such vendor be a party to any agreement, combination, or understanding with any competitor in the production, manufacture, or sale of any merchandise in the same general class in regard to the price at which the same shall be sold either to dealers at wholesale or retail or to the public.

(B) Such vendor shall affix a notice to each article of commerce or to each carton, package, or other receptacle inclosing an article or articles of commerce covered by such contract of sale stating the price prescribed by the vendor at the time of the delivery of said article as the uniform price of sale of such article to the public, and the name and address of such vendor, and bearing the said trade-mark or special brand of such vendor. Such article or articles of commerce covered thereby shall not be resold except with such notice affixed thereto or to the cartons, package, or other receptacles inclosing the same.

(C) Such vendor shall file in the Bureau of Corporations statement setting forth the trade-mark or special brand owned or claimed by such vendor in respect to such article or articles of commerce to be covered by such contract of sale, and also, from time to time, as the same may be adopted or modified, a schedule setting forth the uniform price of sale thereof to dealers at wholesale, and the uniform price of sale thereof (to dealers) at retail from whatever source acquired and the uniform price of sale thereof to the public, and upon filing such statement such vendor shall pay to the Commissioner of Corporations a registration fee of $10.00. The price to the vendee under such contract shall be one of such uniform prices to wholesale and to retail dealers according as such vendee shall be a dealer at wholesale or a dealer at retail, and there shall be no discrimination in favor of any vendee by allowance of a discount for any cause, by the grant of any special concession or allowance, or by payment of any rebate or commission, or by any other device whatsoever.

(D) Any article of commerce or any carton, package, or other receptacle inclosing an article or articles of commerce covered by such contract and in possession of a dealer may be sold for a price other than the uniform price for resale by such dealer as set forth in the schedule provided in the next preceding paragraph (C): First, if such dealer shall cease to do business and the sale is made in the course of winding up the business of such dealer; or if such dealer shall have become bankrupt, or a receiver of the business of such dealer shall have been appointed, provided that such article or articles of commerce shall have first been offered to the vendee thereof by such dealer or the legal representative of such dealer, by written offer at the price paid for the same by such dealer, and that such vendor, after reasonable opportunity to inspect such article or articles, shall have refused or neglected to accept such offer, or, second, if such article of commerce or contents of such carton, package, or other receptacle shall have become damaged, deteriorated, or soiled: Provided, That such damaged, deteriorated, or soiled article shall have first been offered to the vendor by such dealer by written offer, at the price paid for the same by such dealer, and that such vendor, after reasonable opportunity to inspect such article or articles, shall have refused or neglected to accept such offer, and that such damaged, deteriorated, or soiled article shall thereafter only be offered for sale by such dealer with prominent notice to the purchaser that such article is damaged, deteriorated, or soiled, and that the price thereof is reduced because of such damage.

Appendix_____

H. R. 13305

In the Senate of the United States
April 1, 1914

Referred to the Committee on Interstate Commerce and ordered to be printed.

AMENDMENT

Intended to be proposed by Mr. Clapp to the bill (H. R. 13305) to prevent discrimination in prices and to provide for publicity of prices to dealers and to the public, viz: On page 3, lines 21 and 22, insert the following:

Such vendor at the time of filing the statement above provided for shall file an affidavit that such vendor does not have any monopoly or control of the market for articles belonging to the same general class of merchandise as the article or articles covered by such contract of sale; and that said vendor is not a party to any agreement, combination or understanding with any competitor in the production, manufacture, or sale of any merchandise in the same general class in regard to the price at which the same shall be sold, either to dealers at wholesale or retail or to the public, and such affidavit shall be renewed annually; that an additional statement in the renewals of affidavits that such vendor has not theretofore had a monopoly or control of the market for articles belonging to the same general class of merchandise as such article or articles of commerce as shall be covered by such contract of sale, and that such vendor has not theretofore been a party to any agreement, combination, or understanding with any competitor in the production, manufacture, or sale of merchandise in the same general class in regard to the price at which the same shall be sold either to dealers at wholesale or retail or to the public. If such vendor be a corporation, the affidavits herein provided for shall be made, respectively by the president and secretary of the corporation.

* * * * * * * * * * *

S 5195 63:2 Mr. Clapp (by request) April 10, 1914
This is H. R. 13305 as amended Feb. 12.

Appendix_____

H. R. 13860 - 63:2 - Feb. 25, 1914 - Mr. Metz

A BILL

To prevent discrimination between different consumers and localities by establishing uniform prices for uniform commodities.

Whereas experience has demonstrated the advantages and protection to the consumer of standard or uniform commodities marketed under the trademark of the proprietor who originates the commodity and who by careful and responsible business methods and guaranties, and by constant maintenance of the excellence of the commodity, builds up a reputation and standard or uniform value for the commodity, and who thus creates and owns the good will connected therewith; and

Whereas it is desirable that consumers shall be able to purchase uniform commodities in all localities at uniform prices, whereby to prevent discrimination between different consumers and localities; and

Whereas uneven prices for the same uniform commodity tend to effect discrimination between different localities and consumers, and to depreciate the quality of the commodity and to destroy competition in that commodity and to monopolize the sale of the same, and to deceive consumers as to the value of the commodity, and otherwise and wrongfully to appropriate and impair the good will of the originating proprietor; and

Whereas under existing law proprietors possessing large capital, resources, and facilities, through their consequent ability to maintain branch establishments or sole agents throughout the country for fixing uniform prices for uniform commodities, are enabled to discourage competition, to deprive retailers, of their independence, and to prevent them from handling competing commodities, and otherwise to exercise an unfair advantage over smaller competitors; and

Whereas the increased expense of maintaining branch establishments or sole agencies increases the price of commodities to the consumers; and

Whereas uniform prices facilitate the wide and steady distribution of uniform commodities and thus tend to lower the price to consumers by lowering the cost of production and distribution: Now, therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following terms and phrases in this Act are used and inserted with the sole sense, meanings, and definitions set forth.

A "uniform commodity" is hereby declared and defined to be any article, product, or commodity which enters into interstate commerce, and which is standard or uniform in grade, size, and quality with other articles, products, or commodites of the same price of the same proprietor, and which has affixed, printed, stamped, embossed, engraved, or otherwise marked thereon or applied or attached thereto, in any manner, or to the package, can, bottle, box, or

other container, receptacle, or covering of any character whatever, in which the article product, or commodity is packed, contained or inclosed, the trade-mark or trade-name of the proprietor of said article, product, or commodity, which trade-mark or trade-name has been properly registered in the United States Patent Office under the terms and provisions of the Act entitled "An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same," as enacted February twentieth, nineteen hundred and five, and as now, as well as hereafter, amended, together with the notice of the registration of said trade-mark or trade-name, as required by said Act.

A "proprietor" is hereby declared and defined to be any person, firm, corporation or association engaged in manufacturing, selecting, packing, distributing, printing, publishing, or otherwise producing or preparing for the market any uniform commodity under a trade-mark or trade-name, owned by said proprietor, and which has been registered by said proprietor, or his predecessors in business, in the United States Patent Office, under the terms of an Act entitled "An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same," as enacted February twentieth, nineteen hundred and five, and as now, as well as hereafter, amended.

A "dealer at wholesale" is hereby declared and defined to be any person, firm, corporation, or association who or which distributes or sells any uniform commodity to any dealer for resale.

A "dealer at retail" is hereby declared and defined to be any person, firm, corporation or association who or which sells any uniform commodity direct to any consumer.

A "consumer" is hereby declared and defined to be any person, firm, corporation, or association who or which purchases any uniform commodity for ultimate consumption or use.

The expression "interstate commerce," as used herein, is hereby declared and defined to mean commerce between the United States and foreign nations, or among the several States, or between a State or States and places subject to the jurisdiction of the United States or between any Territory of the United States, and in and between such Territory or Territories and any State or States and the District of Columbia, or places under the jurisdiction of the United States, or between the District of Columbia and any State or States and foreign nations or places under the jurisdiction of the United States.

Sec. 2. That the proprietor of any uniform commodity, entering into interstate commerce, may establish a uniform retail selling price for such commodity to all consumers, wherever located, after making due allowance, at the option of the proprietor, for the actual cost of transportation from the point of production or manufacture of such commodity to the point of retail sale or consumption, by a notice of said uniform retail price applied to or connected with said uniform commodity, or served on the dealer either directly or through the usual trade channels: Provided, That the purpose and effect of said uniform retail price is to avoid discrimination between different consumers and localities: And provided also, That the proprietor shall file in the Bureau of Corporations, as a public record, under rules to be prescribed by said Bureau, a uniform price schedule identifying the uniform commodity, and

setting forth the uniform price of sale thereof from the proprietor to all dealers at wholesale, and the uniform price of sale thereof from proprietor and all dealers at wholesale to all dealers at retail, and the uniform retail price of sale from the proprietor and all dealers at either retail or wholesale, to all consumers: And provided, also that new uniform price schedules shall always be filed in the Bureau of Corporations not less than thirty days before sales at newly established uniform prices may lawfully be made by the proprietor, such new schedules to apply only to uniform commodities which have notice of the new uniform consumer's price applied thereto or connected therewith,

Sec. 3. That any proprietor or any dealer at wholesale or retail who shall violate either the wholesale or retail uniform selling price of a uniform commodity entering into interstate commerce by charging or accepting, at wholesale, or retail, as the case may be, a less price, directly or indirectly, for said commodity than the wholesale or retail uniform price established by the proprietor, shall be liable to an action for damages and an injunction at the suit of any proprietor, dealer, or consumer engaged in producing, or dealing in or with, or in consuming such uniform commodity.

Sec. 4. That any uniform commodity in possession of a dealer at wholesale or retail may be sold for a price other than the uniform price set forth in the uniform price schedule filed under section two hereof providing such dealer shall cease to do business and the sale shall be in the course of winding up the business of such dealer, or providing such dealer shall have become bankrupt or a receiver of the Business of such dealer shall have been appointed: Provided, that in either case above specified such uniform commodity shall have first been offered to the proprietor by the dealer, receiver, or trustee in bankruptcy, or the legal representative of the dealer, by a written offer at the price paid for the uniform commodity by such dealer, and that such proprietor, after reasonable opportunity to inspect such article or articles shall have refused or neglected to accept such offer, or providing such uniform commodity shall have become damaged, deteriorated, or soiled, and providing that such damaged, deteriorated, or soiled articles shall have first been offered to the proprietor thereof by the dealer by written offer, at the price paid for the same by such dealer, and that such vendor, after reasonable opportunity to inspect such uniform commodity, shall have refused or neglected to accept such offer, and providing that such damaged, deteriorated, or soiled articles, shall thereafter only be offered for sale by the dealer with prominent notice to the consumer that such uniform commodity is damaged, deteriorated, or soiled and that the price thereof is reduced because of such damage.

Sec. 5. That nothing in this Act shall be construed as repealing an Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," which became a law on the second day of July, in the year eighteen hundred and ninety.

* * * * * * * * * * * * *

H.R. 11 - 71:3 Mr. Kelly January 30, 1931.

An Act to protect trade-mark owners, distributors, and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguishing trade-mark, brand, or name.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That no contract relating to the sale of a commodity which bears (or the label or container of which bears) the trademark, brand, or trade-name of the producer of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed to be unlawful, as against the public policy of the United States or in restraint of interstate or foreign commerce or in violation of any statute of the United States, by reason of any agreement contained in such contract, but no such contract shall authorize the producer, or manufacturer, or packer, giving a trade name, brand, or trade-mark to any commodity, to fix or prescribe the retail prices of such necessities of life as meat and meat products, flour and flour products, agricultural implements, tools of trade, canned fruits and vegetables, all clothing, shoes and hats.

That the vendee will not resell such commodity except at the price stipulated by the vendor and/or that the vendee will require any dealer to whom he may resell such commodity to agree that he will not in turn resell except at the price stipulated by such vendor or vendee which price shall have been printed in plain figures on original label or other identifying device on said commodity.

Sec. 2. Any such agreement in a contract in respect to interstate or foreign commerce in any such commodity shall be deemed to contain the implied condition --

(a) That during the life of such agreement all purchasers from the vendor for resale at retail or for delivery after such resale or in any city or town merchants located in which are in fair and open competition with such vendee shall be granted equal terms as to purchase and resale prices;

(b) That the vendee may resell at a price below the stipulated resale price which yields not less than 20 per centum over the actual bona fide purchase price paid by him;

(c) That such commodity may be resold without references to such agreement --

(1) In closing out the owner's stock for the purpose of discontinuing dealing in such commodity or of disposing, toward the end of a season, of a surplus stock of goods specially adapted to that season;

(2) With notice to the public that such commodity is damaged or deteriorated in quality, if such is the case;

(3) By a receiver, trustee, or other officer acting under the orders of any court or any assignee for the benefit of creditors;

(4) When it is necessary to the conduct of the business of the owner either because of excessive inventory or because of insufficient funds or credit; or

(5) If after the vendee gives notice to the vendor containing a statement of the quantity and condition of the commodity and the cost price thereof, less transportation charges paid by the vendee, if any, thereon, the vendor fails within ten days to repurchase such commodity at the cost price less such transportation charges, if any, and less a reasonable adjustment for deterioration in quality, if any. For the purposes of this section, notice served by registered letter mailed to the vendor shall be sufficient and such period of ten days shall run from the delivery of the letter to the vendor.

Sec. 3. Nothing contained in this Act shall be construed as legalizing any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Sec. 4. As used in this Act --

(1) The term "producer" means grower, packer, maker, manufacturer, or publisher.

(2) The term "commodity" means any subject of commerce. Passed the House of Representatives January 29, 1931

Attest:

Wm. Tyler Page,

Clerk

H. R. 11 - 72:1 - Mr. Kelly December 8, 1931.

A BILL

To protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguishing trade-mark, brand or name,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that no contract relating to the sale or resale of a commodity which bears (or the label or container of which bears) the trade-mark, brand, or name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed to be unlawful, as against the public policy of the United States or in restraint of interstate or foreign commerce or in violation of any statute of the United States, by reason of any agreement contained in such contract:

(1) That the vendee will not resell such commodity except at the price or prices stipulated in such contract; and/or

(2) That the vendee will require any dealer to whom he may resell such commodity to agree that he will not in turn resell except at the price or prices stipulated in such contract: Provided, That prices stipulated in any such contract shall be uniform to all vendees in like circumstances, differing only as to quantity of such commodity sold, the point of delivery, and the manner of settlement.

Sec. 2 Any such agreement in a contract in respect of interstate or foreign commerce in any such commodity shall be deemed to contain the implied conditions that such commodity may be resold without reference to such agreement.

(1) In closing out the owner's stock for the purpose of discontinuing dealing in such commodity; or

(2) In disposing of such commodity when damaged, deteriorated, or soiled, with prominent notice to the public that such is the case; or

(3) By a receiver, trustee, or other officer acting under the orders of any court: Provided, That such commodity shall have first been offered to the vendor thereof by such vendee or the legal representatives of such vendee by written offer, at the price paid for the same by such vendee, and that such vendor, after reasonable opportunity to inspect such commodity, shall have refused or neglected to accept such offer.

Sec. 3. Such contracts for sale of such commodity may provide for disposal and/or seasonal sales at appropriate times, during which periods such commodity may be resold without reference to such agreement: Provided, that such commodity shall have first been offered to the vendor by such vendee by written offer, at the price paid for the same by such vendee, and that such vendor, not less than thirty days prior to the date stipulated in such contract for the next such disposal and/or seasonal sale after reasonable opportunity to inspect such commodity, shall have refused or neglected to accept such offer.

Sec. 4. Nothing contained in this Act shall be construed as legalizing any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Sec. 5. No suit arising out of any such agreement shall be brought in any court of the United States in any other judicial district than that in which the defendant is an inhabitant, or in which he has a regular and established place of business, and/or where service of process, summons, or subpoena may be made by service upon the agent or agents engaged in conducting such business.

Sec. 6 This Act may be cited as the "Fair Trade Act."

Appendix_____.

S 299 - 73rd Congress 1: Mr. Capper - March 9, 1933.

Mr. Capper introduced the following bill which was read twice and referred to the Committee on Interstate Commerce

A BILL

To define the intent of the anti-trust laws as to certain agreements.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that nothing in the anti-trust laws as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, shall be deemed to prevent a grower, producer, or dealer, selling goods identified by a special brand name or trade-mark of which he is the owner, from specifying, by agreement with distributors the resale prices of such identified merchandise, which prices stipulated in any such agreement shall be to all distributors in like circumstances, differing only as to the quantity of such merchandise sold, the point of delivery, and the manner of settlement.

* * * * * * * * *

NOTE S 497 - 73:1 - Mr. Capper - March 29, 1933, differs only in that "uniform" was inserted before "to" in line 11.

H. R. 3100 - 73:1 - Mr. Kelly - March 11, 1933, Identical with S 299 - 73:1 - Mr. Capper.

H. R. 3677 - 73:1 - Mr. Kelly - March 16, 1933 Identical with S 497 - 73:1 - Mr. Capper - March 29.

APPENDIX H

Notice Cited in Robt. H. Ingersoll & Bro. vs. Hahne & Co., (No. 43/384)
Court of Chancery of New Jersey, Aug. 14, 1917, (101 At. 1030)

"All Ingersoll watches are sold subject to a notice, a copy of which is as follows:

NOTICE:

"The use of our name, trade-mark, guarantee, reputation, good will, and selling helps is licensed to the dealer for the sole purpose of selling or offering, advertising or displaying for sale, this watch, provided this watch is not sold offered, advertised, or displayed for sale with or as any donation, discount, rebate, premium, or bonus, or to any wholesale or retail dealer at rates different from those specified in our schedules, or at any other retail price than $1.35, without first removing this notice and our name, trade-mark, and guarantee, and returning to us our selling helps and refraining from the use of our name, trade-mark, guarantee, reputation, good will, and selling helps, and provided the dealer shall, upon our written request (unless he shall have previously sold it), resell to us this watch, if then merchantable, at the rate specified in our schedules for the quantity in which he purchased, or if then damaged, at such rates as shall then be agreed upon.

"Any violation of any of the above conditions depreciates our name, trade-mar, reputation, and good will, and will act as a revocation of this license. Any use of our name, trade-mark, guarantee, reputation, good will, or selling helps aids the dealer in selling this watch and will act as an acceptance of the above conditions. The dealer may sell or otherwise dispose of this watch as he pleases after first removing this notice and our name, trade-mark, and guarantee, and returning to us our selling helps, and refraining from the use of our name, trade-mark, guarantee, reputation, good-will, and selling helps; but he has no right to use any of them in violation of the above conditions or to do anything to depreciate their value. Any dealer who violates any of the above conditions will be liable to suit for damages and an injunction.

"Upon written request of any dealer observing the above conditions, we agreed (1) to repurchase from him this watch, if then merchantable, at the rate specified in our schedules for the quantity in which he purchased, or if then damaged, at such rate as shall then be agreed upon; or (2) to leave him free, after first removing this notice and our name, trade-mark, and guarantee, to sell or otherwise dispose of this watch without regard to the above conditions."

Robt. H. Ingersoll & Bro.

NOTICE CITED IN INGERSOLL VS. GOLDSTEIN
COURT OF CHANCERY OF NEW JERSEY, 1915
(93 At. 193)

"LICENSE

"Robt. H. Ingersoll and Bro., Makers
"New York, Chicago, London, San Francisco

"Mechanism in this watch is covered by United States patents and the watch is licensed and sold under and subject to the following conditions assented to by purchase and controlling all sales and uses thereof, and violation of which license condition revokes and terminates all rights and licenses as to this and all other watches of makers in violator's possession and subjects the violator to suit for infringement of said letters patent:

"(1) Jobbers may sell only to retail dealers, may not sell to anyone designated by the makers as objectionable, may not detach or sell without this notice and may sell only at rates specified in schedules furnished by the makers.

"(2) Retailers may advertise and sell only to buyers for use at one dollar.

"(3) No donation, discount, rebate, premium or bonus may be allowed or given in connection with any sale at wholesale or retail.

"(4) It will not be offered as a premium or bonus for or in connection with the sale of other goods; or included in any combined sale.

"(5) Guarantee with date of sale indorsed thereon to accompany each watch.

Ingersoll Dollar Watch
Trade-Mark Reg. U. S. Pat. Off.
Nicket Finish Arabic"

APPENDIX I

PEPSODENT COMPANY CANCELS FAIR TRADE CONTRACTS

(From Drug Trade News, July 22, 1935, Page 1.)

Company tells California Druggists Move is Due to a Need for Shipments from Chicago.

Chicago, Illinois, - The Pepsodent Company of this city, has, through its California branch, terminated its fair trade contracts with retailers in California and has notified the druggists of that state that the contracts are no longer in force.

It is understood that the contracts protecting prices on Pepsodent products, were terminated because of the danger of violations of the interstate commerce laws.

In a letter to all druggists of the country, the company has also notified the trade of new suggested minimum prices and "Special Sales Day Prices."

Two letters were sent to retail druggists in California, the first to those who had signed Pepsodent contracts and the second to all of the retail and wholesale drug trade in the state.

The letter to those who had signed contracts said:

> "Notice: Pursuant to paragraph six of written agreement under California Fair Trade Act between you and the Pepsodent Company of California, we hereby notify you of termination thereof, for the reasons stated in the attached notice to California drug trade."

The second letter to all of the wholesale and retail trade in the state, read:

> "Manufacturing requirements compel us to make various shipments in the future direct to Chicago to jobbers and dealers in California. Since such shipments will involve interstate commerce, it is necessary for the Pepsodent Company of California to withdraw from any operation under the California Fair Trade Act."

The letter which the Pepsodent Company sent to druggists throughout the country, explaining its new price policy follows:

> "To The Retail Drug Trade:
> "So much confusion exists as to the propriety of maintaining resale prices that we repeat several fundamental and well

established principles which have in no respect been modified and which are still fully effective:

Under repeated decisions of the United States Supreme Court, a seller of products in interstate commerce is powerless to compel any purchaser to adhere to, or agree to, resale prices suggested and recommended.

Upon sale, the products become the property of the purchaser, without any restraint on the part of the seller.

However, if the seller chooses, he may refuse to make further sales to any purchaser. The Pepsodent Company, as occasion offers, will exercise its legal right to choose to whom it shall sell.

Both as assurance of profits to the dealer and in protection to the business of the Pepsodent Company, we earnestly recommend that the following suggested scale of resale prices, which is national in scope, be added to:

	Everyday Minimum Prices	Special Sales Day Prices
Peps. Tooth Paste 50¢ size	38¢	34¢ - 3 for $1.00
Peps. Tooth Powder 25¢ size	23¢	21¢
Peps. Tooth Powder 50¢ size	38¢	34¢ - 3 for $1.00
Peps. Antiseptic 25¢ size	23¢	21¢
Peps. Antiseptic 50¢ size	38¢	34¢ - 3 for $1.00
Peps. Antiseptic $1.00 size	79¢	71¢
Peps. Junis Cream 35¢ tubes	31¢	28¢
Peps. Junis Cream 50¢ jars	38¢	34¢ - 3 for $1.00
Peps. Junis Cream $1.00 jars	79¢	71¢

"The above Everyday Minimum Prices are the same as those heretofore announced.

In many sections of the country, dealers feel that special sales events are necessary. For this reason, we suggest the above scale of Special Sales Day prices. However, we do not believe that the Sales Day Prices should be in effect as the Everyday Prices.

The Pepsodent Company holds out no panacea and no wordy evasions, calculated to inspire assurances, which cannot be lived up to, for price maintenance. It will be governed strictly by the foregoing simple and fundamental principles, and it earnestly urges for the assurance of reasonable profit both for purchaser and seller that the above suggested minimum resale prices be adhered to."

APPENDIX J

SUMMARY OF STATE COURT DECISIONS ON RESALE PRICE MAINTENANCE TOGETHER WITH DIGEST OF STATUTES WHICH HAVE OR MAY BE INTERPRETED AS APPLYING TO RESALE PRICE MAINTENANCE*

*This summary was prepared with the aid of Mr. Leonard Bowman of the Division of Review.

ALABAMA — Price fixing is prohibited (Code of 1923: Section 5212-5). Persons injured by unlawful trust, combine or monopoly may recover damages. (5697-8). Debtor may not avoid payment of debt for goods purchased under contract containing any price fixing provisions. Court will not, however, aid in enforcing resale price maintenance provisions of contracts, nor allow damages for breach of contract. W. T. Rawleigh Med. Co. vs. Walker (1917) 16 Ala. App. 262 Dotham Oil vs. Espy 127 So. 178, 220 Ala 605.

ARIZONA — Price fixing by contract, combination or agreement is prohibited (Constitution Article 14, Paragraph 15). Combinations between two or more persons to regulate prices, limit production, or prevent competition are unlawful. (Revised Code 1928 Chapter 77, Section 3212). Such combination is punishable by forfeiture of charter of incorporation (3213). That the plaintiff has been guilty of the same type of violation within one year is a defense in a civil action (3216). The court has had no opportunity to rule on resale price maintenance.

ARKANSAS — Participation by any person, either material or corporate, in any trust or combination, domestic or alien, to regulate or maintain, within or without the state, the price of any article, or being a party to a pool within the state to fix or limit the quantity or quality of an article is consoiracy. Penalty includes a fine plus forfeiture of all franchises of offending corporation. (Statutes 1919, Chapter 124, Section 7368-71) Corporation must furnish annual affidavits that has neither created nor participated in any trust or combination. (7375) The court has had no opportunity to rule on resale price maintenance.

CALIFORNIA — Has the oldest effective Fair Trade Law (Statutes of California and Amendment to the Code 1933, Chapter 260. Statutes of 1931, Chapter 278, page 583 amended). There has been no Supreme Court decision on this Statute. The San Francisco Superior Court has once upheld the amended law, in Waco Products Co. of California vs. Sunset Cut-Rate Drug Company, Superior Court of California, San Francisco County, No. 248,375. January 24, 1935. The Los Angeles Superior Court has once declared the amended law unconstitutional, in Max Factor vs. Kunsman, Superior Court of California, Los Angeles County, No. 363,006, October 18, 1933; and once upheld the amended law in General Cigar Co., Inc., vs. The Drug Market, Superior Court of California, Los Angeles County, No. 372,399, September 18, 1934. The Sontag vs. Dr. Miles Medical Laboratories, Inc., and Dr. Miles California Company case which questions the legality of the amended law is pending in the Superior Court of California, San Francisco County.

Several injunctions prohibiting price cutting have been granted under the amended law.

COLORADO — Combinations restraining trade, or commerce controlling or fixing prices, limiting production, preventing competition are illegal, (Compiled Laws of 1921, Chapter 68, Sections 4036 - 4043). This statute was declared unconstitutional in 1927, Cline vs. Frink, 274 U. S. 445.

CONNECTICUT — It is a crime to agree to fix or maintain a price on any commodity which is a necessity of life. (General Statutes Revision of 1930, Title 59, Chapter 330, Section 352). No cases have been tried. However this is a penal statute without definition of the crime; a similar statute was declared illegal in U. S. vs. Cohen Grocery Company, 255 U. S. 81 (1920). The Retail Drug Control Act is now in effect. (Laws of 1935).

DELAWARE — Has no statutes which affect resale price maintenance. Breach of Exclusive Agency contract is actionable. Cramer vs. Lewes Sand Company, 15 Del., Ch. 329.

FLORIDA — Combinations by two or more persons, either natural or corporate, to restrain commerce, prevent competition, regulate the price of merchandise, produce or commodities, fix or control prices of commodities within the state, or agreeing to refrain from selling below a certain price are prohibited. (Compiled General Laws 1927, Sections 7944-7948). Contracts or agreements violating above provisions are void. (7953). Penalty: Domestic corporations forfeit charters (7945); foreign corporations are prohibited from doing business in the state, (7947). The court has had no opportunity to rule on resale price maintenance.

GEORGIA — Contracts in general restraint of trade are void. No corporation may acquire stock of, or enter into agreement with another corporation if the effect or intent of such action is lessening of competition or fostering monopoly. Any such contract is void. (Code 1933, Section 2-2504 et seq. and Section 20-504.) The court has had no opportunity to rule on resale price maintenance.

IDAHO — Monopolies and restraint of trade are illegal. Both are misdemeanors. Giving, soliciting or accepting rebates is unlawful and a misdemeanor. (Code 1932, Sections 47-101-117). The court has had no opportunity to rule on resale price maintenance.

ILLINOIS — Pools, trusts and combines are illegal. (Smith-Hurd Revised Statutes, 1933, Chapter 38-598) Penal sentence for officers and members of participating corporations. (38-601). Contracts in violation of the Act are void (38-602). Purchasers of commodities produced in violation of Act are not liable therefore, and may plead the Act as a defense. (38-603). The courts have been very lenient in applying the anti-trust acts to resale price maintenance. Refused to apply the laws to "agency agreements." Weiboldt vs. Standard Fashion Company, 80 Ill. App. 67 (1898) (Texas, Ohio, Mississippi, and North Carolina held the identical contracts to be sales contracts). Fair Trade Law now in effect. (Laws of 1935).

INDIANA — Arrangements, contracts, combinations regulating prices or costs of articles, controlling production are unlawful and void. Domestic corporations forfeit charters, foreign corporations may not do business in the state. (Baldwin's Indiana Statutes 1934, Section 4-636-41). Combinations or agreements of refusal to sell merchandise or supply tools needed for manufacture are unlawful. Such contracts are void. Persons injured may collect damages (4642-50). Although manufacturers have used resale price maintenance agreements the court has never ruled whether the statutes against price fixing apply to resale price maintenance.

IOWA — Combinations restraining or preventing full and free competition in trade are prohibited. (Code 1931 Sections 9915, 9916) Goods contracted for between a resident and non-resident of the State, and sold within the State, are in Interstate Commerce. Hence the State applies the Sherman Anti-Trust Act. Allen v. Parks (1923) 196 Iowa 943. Fair Trade Law now in effect (Laws of 1935).

KANSAS — Combinations to restrain commerce, fix prices, prevent competition are defined as trusts and are unlawful. Such contracts are void.. (Revised Statutes 1923, Section 50-101,105,113.) Pools to fix prices are illegal. (50-136) Discrimination in prices between different localities (except to equalize freight charges) is illegal (50-149). Court refusal to allow recovery of money under a contract containing a price fixing provision which was contrary to the Anti-Trust Statute. Mills v. General Ordnance Co., (1923) 113 Kan. 479.

KENTUCKY — Kentucky Anti-Trust Statutes were all repealed in 1922. Cooperative Marketing Act permits combinations

between producers of Agricultural products. (Chapter 1, Laws of 1922). The court had no opportunity to rule on resale price maintenance.

LOUISIANA — Contracts, Combinations, Trusts, Conspiracies to restrain trade, Fix or Limit quantity of production or sale or to influence prices in any manner are illegal. (1890 Act 86, 1892 Act 90, 1915 Act 11, Extra Session, Constitution (1921) Article 13, Section 5). The court has had no opportunity to rule on resale price maintenance.

MAINE — Contract, Combination or Conspiracy in restraint of trade or commerce is illegal. (Revised Statutes 1930, Chapter 138, paragraphs 28-30). Trusts are prohibited (Chapter 56, Paragraph 60). Cooperative Marketing Associations marketing of fish, fish products and agricultural products of the State are legal. (Chapter 56, Paragraph 60 - Chapter 59, Paragraph 28). The Court has had no opportunity to rule on resale price maintenance.

MARYLAND — Monopolies are unconstitutional. (Article XLI) In Klingle et al v Sharp and Dohme, Nov. 2, 1906 (64 At 1029) the Court of Appeals of the State of Maryland declared illegal the attempt to enforce resale price maintenance through boycott of price-cutters, by retailer and wholesaler groups. Fair Trade Law (Chapter 212, Laws of 1935).

MASSACHUSETTS — Exclusive agency is legal. However, restriction of non-agent to a limited number of brands is prohibited (General Laws 1932. Chapter 93, Paragraph 1). Price fixing or price manipulating agreements and combinations are prohibited. (Chapter 93, Paragraphs 2, 8, 9, 10, 13). The court has had no opportunity to rule on resale price maintenance.

MICHIGAN — Trusts, Monopolies, and Combinations in restraint of trade which would tend to limit production, fix prices or restrain or limit competition are prohibited. (Compiled Laws 1929, Sections 16647 - 16660). Such contracts are void. (Sections 16661 - 16682). Although manufacturers have used resale price maintenance agreements, the court has never ruled whether the statutes against price fixing apply to resale price maintenance.

MINNESOTA — Combinations and agreements tending to fix, control, limit or maintain prices of articles of trade, manufacture, or use, bought or sold within the State, are prohibited. Discrimination by manufacturers between dealers is prohibited. (Mason's Statutes 1927, Section 104-64). The court has had no opportunity to rule on resale price maintenance.

MISSISSIPPI — Price fixing combinations or agreements are void and cannot be enforced in any court. (Code 1930, 3441). Debtor cannot avoid payment for goods obtained under contract containing price fixing provision. The court, however, will not enforce price maintenance provisions in contracts nor allow damages for breach of such provision. Hauck v. Wright 27 So. 616 (1900).

MISSOURI — Price Fixing or production control through combinations or agreements is a felony. A corporation judged guilty is subject to fine, forfeiture of charter or forfeiture to the State of all or any part of its property in the State. Corporations must file an "anti-trust" affidavit annualy with the Secretary of State (Revised Statutes 1929, Chapter 47, Sections 8700 - 8734). Although manufacturers have used resale price maintenance agreements, the court has never ruled whether the statutes against price fixing apply to resale price maintenance.

MONTANA — Trusts in restraint of trade are prohibited. Penalty is imprisonment not in excess of one year, or fine not in excess of $5,000 or both. (Revised Code 1921, 10901). An Oil Company's lease of service station was held not void as fixing prices or preventing unrestricted competition because the contract contained the provision that lessee should maintain established price of gasoline of the lessor at its other service stations. (Quinlivon v. Brown Oil Co. (1934) 29 P. (2nd)374.

NEBRASKA — Every contract or combination in form of trust or conspiracy in restraint of trade or commerce is illegal. (Compiled Statutes 1929 Chapter 59, Paragraph 801). The court has had no opportunity to rule on resale price maintenance.

NEVADA — Has no legislation which effects resale price maintenance.

NEW HAMPSHIRE — Combinations to monopolize trade, restrict competition, or control production or prices, are illegal. (Public laws 1926, Chapter 168 Paragraphs 1-3). The court has had no opportunity to rule on resale price maintenance.

NEW JERSEY — Price discrimination between different localities, (allowance for equalization of freight and other costs excepted) is illegal. (3427). Resale price maintenance by notice is permitted by the Law of 1913, amended 1915 and 1916 (Section 225; 1, 2 and 3, Compiled Laws of New Jersey, 1911-1924). Action under this law was upheld in Ingersoll and Bro. v. Hahne and Co., 101 At. 1030 (1917) and 108 At. 128 (1918), Court of Chancery of the State of New Jersey.

NEW MEXICO — Contracts or combinations restraining trade are illegal and a misdemeanor (Chapter 35, Sections 2901 to 2903). The court has had no opportunity to rule on resale price maintenance.

NEW YORK — Price fixing and monopolies are prohibited. (General Business Laws paragraphs 340 and 341). The court has ruled that Interstate Commerce ceases when the goods are delivered into the State. Butterick Publishing Co. v. Mistrot-Munn Company, (1915), 167 App. Div. New York 632, affirmed 217, N. Y. 678. Right of refusal to sell in the absence of conspiracy to injure has been upheld. Brown v. Metro Rems Co., (1933), 267 N. Y. S. 623; and Lucomsky v. Palmer, (1931) 252 N. Y. S. 529. Fair Trade Law now in effect (Laws of 1935).

NORTH CAROLINA — Contracts or combinations in restraint of trade or commerce are illegal. Participation in such an agreement is a misdemeanor. (Code 1931, Section 2559). Monopoly Statute condemns contract of sale only in event the sale is made "upon condition" that purchaser shall not deal in goods of seller's competitor. (2563 Sec. 2) Lewis v. Archbell, (1930) 154 S. E. 11.

NORTH DAKOTA — Discriminatory prices (not justified by differences in quality, grade or cost of transportation) are prohibited. (Compiled Laws 1913, Sections 3043; 3048). Combinations between individuals, corporations or associations to control prices of product of soil, or article of manufacture or commerce, or cost of exchange, or transportation are prohibited by the Constitution (Constitutional Article Number 146). The court has had no opportunity to rule on resale price maintenance.

OHIO

Combinations restraining trade or commerce, limiting production, regulating prices, preventing competition, fixing prices to prevent competition are illegal. (General Code 6391). The court refused to allow an action for breach of contract in Freemen v. Miller (1909) 21 Ohio Dec. 766; or to permit recovery of goods when said contract comes under Statute of State, Interstate Commerce ceases when goods are delivered in the State; McCall v. O'Neil, 1914, 25 Ohio Dec. 591. Contract between foreign corporation and resident purchaser, under which manufactured products were sold and delivered F. O. B. cars outside of State for purpose of resale in designated county in State for price and in manner and under terms desired by purchaser. Held not void as in Restraint of Trade. Griffin v. Lange Co., 41 P (2nd) 63€.

OKLAHOMA

Price discrimination for the effect of, or with the intent to establish a monopoly restraining trade, is unlawful. (Laws, 1931 Section 12790) Price discrimination between persons or localities (due allowance being made for difference in quality and cost of transportation) is illegal. (Laws 1933, Chapter 112) Monopolies and discrimination are prohibited in the Constitution. (Article 9, Paragraph 45). In the earlier cases court ruled that sales between a resident and a non-resident of goods for resale within the State were Interstate Commerce and as such came under the jurisdiction of the Sherman Anti-Trust Laws, and would not allow recovery of unpaid balance under such Interstate contracts. Stewart v. W. T. Rawleigh Med. Co. (1916) 58 Okla. 344; Hunt v. W. T. Rawleigh Med. Co. (1918) 71 Okla. 193; Brooks v. J. R. Watkins Med. Co. (1921) 81 Okla. 82. In the later cases the same court ruled that the sending of catalogues containing suggested resale prices was "educational and advisory" and thus had no effect upon the contract of which they were no part. Gordon v. W. T. Rawleigh Med. Co. (1926), 117 Okla. 235; Sparkman v. W. T. Rawleigh Med. Co. (1926), 117 Okla. 235; Thomason v. W. T. Rawleigh Med. Co. (1926) 117 Okla. 239. No resale price maintenance cases have been decided under the State price fixing statutes.

OREGON

A prior law permitting resale price maintenance was ineffective because of the difficulty and expense of enforcement. See page 55 for text of this law which was replaced by the Fair Trade Law. (Laws of 1935)

PENNSYLVANIA

Prior to the enactment of this law, there existed no statutes affecting resale price maintenance. Fair Trade Law (H. F. 1976. Section 1935).

RHODE ISLAND

There are no statutes affecting resale price maintenance. Price fixing is not illegal, but becomes so if indulged in by a monopoly. State v. Eastern Coal Co. (1908) 29 R. I. 254.

SOUTH CAROLINA

Arrangements or combinations made with the intent to, or with effect of tending to monopolize trade, restrict competition or control production or prices are unlawful and void as against public policy (Code of Laws 1932, Vol. 3-6620) Sales below cost of manufacture, to injure competitors are prohibited (Vol. 3-6634) The court has had no opportunity to rule on resale price maintenance.

SOUTH DAKOTA

Business trusts in restraint of trade are unlawful. (Compiled Laws 1929, Sections 4352-4364). The court has had no opportunity to rule on resale price maintenance.

TENNESSEE

Business trusts in restraint of trade are unlawful: (William's Code Annotated 1934, Sections 5880 and 3826). The court has had no opportunity to rule on resale price maintenance.

TEXAS

Trusts, monopolies and conspiracies in restraining of trade are prohibited and punishable by imprisonment. (P. C. 1637). Price fixing is prohibited. (Rev. Civ. Stat. 1925; articles 5426-7438; 1632-1644). Persons outside the state are liable if they form a monopoly which does business within the state. The statutes prohibiting price fixing and exclusive territory agreements are rigidly enforced. The Penal Statute has never been enforced. In a long series of cases involving contracts between residents and non-residents of the state regarding merchandise for resale within the state the court has held that interstate commerce ceases when goods are delivered into the state. Thereafter the state statutes apply and such contracts are void. Burpee Can Sealer Company v. Henry McDonnell Company (1934). 75 S. W. (2nd) 458. Manufacturers' Finance Corporation v. Fort Worth Paper Company (1934), 68 S. W. (2nd) 307. Tri-State Sale Company v. National Automatic Machine Company (1931), 38 S. W. (2nd) 838. McDaniels v. Schmolstoig (1931), 36 S. W. (2nd) 278. Ormsby v. Ratcliff (1930), 22 S. W. (2nd) 504. National Automatic Machine Company v. Smith (1930), 32 S. W. (2nd) 678. Henderson Tire and Rubber Company v. Roberts (1929). 12 S. W. (2nd) 154.

UTAH — Combinations intending to control or controlling prices of professional services, products of soil, articles of manufacture or commerce or cost of exchange or transportation are unlawful. Parties to agreements, pools or other arrangements to regulate or fix prices or fix or limit production or sale are guilty of conspiracy to defraud. (Revised Status 1933, Title 73, paragraph 763). The Court has had no opportunity to rule on resale price maintenance.

VERMONT — Court of Chancery may dissolve corporations creating monopoly or unreasonably restraining trade. (Compiled Statutes 4944, 5025 and 5068). The Court has had no opportunity to rule on resale price maintenance.

VIRGINIA — Trusts, combinations and monopolies inimical to public welfare, are unlawful and void. Applies only to trusts, etc., which are unreasonably and are (or is extended to interstate commerce would be) prohibited and penalized under the Laws of the United States, (Code 1930, Chapter 4722 Subsections 5 to 21). The Court has had no opportunity to rule on resale price maintenance.

WASHINGTON — The State Constitution prohibits combinations both direct and indirect for the purpose of fixing the price or limiting the production, or regulating the transportation of any product or commodity. (Constitutional Article 12, paragraph 22). American Export Door Company v. John A. Sanger Company, (1930), 283 Pac. 467. The Court has had no opportunity to rule on resale price maintenance. Fair Trade Law (Laws of 1935). This is an emergency law effective for 2 years.

WEST VIRGINIA — Has no legislation affecting resale price maintenance.

WISCONSIN — Monopolies and restraint of trade declared illegal and may be prevented or restrained by injunction. (Statute 1933, Section 133.01). State v. Lewis and Leidersdorf Company, (1930), 154 S. E. 11. Although manufacturers used resale price maintenance agreements, the Court has never ruled whether the anti-monopoly statute applies to resale price maintenance, prior to the enactment of the Fair Trade Law (Laws of 1935), nor has it rendered any decisions since.

WYOMING — Monopolies and restraint of trade are illegal. Price fixing is prohibited. (Revises Statutes 1931, Chapter 117, Section 201 to 205). The Court has had no opportunity to rule on resale price maintenance.

SOURCES:

Seligman and Love - "Price Cutting and Price Maintenance" Appendix Three

Roy S. Warnack - "California Fair Trade Act" - Published by the National Association of Retail Druggists

The Los Angeles Daily Journal - January 31, 1934.

Martindale and Hubbell - "Law Directory, Digest of Laws, 1934."

American Digest System

National Reporter System

Corpus Juris

Ruling Case Law

APPENDIX K

Summary of Leading Cases on Resale Price Maintenance

United States Supreme Court

1. Resale Price Maintenance Under Patent

   (a) Bement v. National Harron Company
   186 U. S. 70 (May, 1902) Resale price maintenance by notice under patent upheld.

   (b) Bauer & Cie v. O'Donnell.
   229 U. S.1(May, 1913) Resale price maintenance by notice under patent held illegal.

   (c) Straus v. Victor Talking Machine Company
   243 U. S. 490 (April, 1917). Resale price maintenance by license under patent held illegal.

2. Resale Price Maintenance Under Copyright

   (a) Bobbs - Merrill Company v. Straus.
   210 U. S. 339 (June, 1908). Resale price maintenance by notice under copyright held invalid and not binding except where bound by license or agreement.

   (b) Straus v. American Publishers Association.
   231 U. S. 222 (December, 1913). Resale price maintenance under copyright held illegal.

3. Resale Price Maintenance Under Trade-Mark.

   United States v. Schrader's Sons, Inc.
   252 U. S. 85 (March, 1920). Resale price maintenance contracts held illegal. (The defense argued trade-mark rights as basis for the resale price control)

Note: An important federal case is Jayne v. Loder, 149 Fed. Rep. 21 (December 1906). Ruled that refusal to sell is legal, but that combinations and agreements to refuse to sell to anyone who cut the price of products of any party to such agreement is in restraint of trade. (This case was court test of the Tripartite Agreement in the drug industry).

4. Resale Price Maintenance by Contract

   (a) Dr. Miles Medical Company v. John Parks & Sons.
   220 U. S. 373 (April, 1911).Resale price maintenance by contract under trade-mark held illegal. (The contracts were in the form of consignment contracts but court ruled that the transactions were not bona fid consignment transactions).

   (b) Boston Store v. American Graphophone Company
   246 U. S. 8 (March, 1918). Resale price maintenance by contract (under patent) held illegal.

5. Resale Price Maintenance by Refusal to Sell.

(a) United States v. Colgate and Company
250 U. S. 300 (June, 1919). Refusal to sell to price-cutters upheld.

(b) Federal Trade Commission v. Beech-Nut Packing Co.
257 U. S. 441 (January, 1922). Contracts and agreements to refuse to sell held illegal.

Note: A recent federal case is Armand Co., Inc., v. Federal Trade Commission, U. S. Circuit Court of Appeals, 2nd Circuit, July 1, 1935.

Federal Trade Commission order to cease and desist from (1) entering into procuring, either directly or indirectly from wholesale or retail dealers, contracts, agreements, understandings, promises or assurances that respondent's products, or any of them, are to be resold by such wholesale or retail dealers at prices fixed by petitioner; (2) entering into or procuring either directly or indirectly from wholesale dealers contracts, understandings, promises, or assurances that petitioner's products are not to be resold by such wholesalers to price cutting retail dealers.

Order affirmed.

6. Cases commonly referred to as resale price maintenance are those involving the fixing of the price to be charged by an agency. These are not strictly speaking "resale" prices, since the product is not sold to the agent.

United States v. General Electric Company,
272 U. S. 476 (November, 1926). Fixing prices to be charged by agency upheld.

APPENDIX L

SOME LEGAL ASPECTS OF RESALE PRICE MAINTENANCE AGREEMENTS IN INTERSTATE COMMERCE*

FACTS: There is a contract for the purchase of merchandise between an Ohio vendor and a California vendee, which required the vendee to maintain at retail, the prices fixed by the vendor.

The Sherman Act (Act, July 2, 1890, C. 647, 26 Stat. - U. S. comp. Stat. 1913, Sections 8820-8830) invalidates all "contracts, combinations * * * in restraint of trade among the several states * * *."

The California statutes provide

"No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee."

Statutes of California and Amendments to the Code, 1933. Chapter 260, pp. 783. Statutes of 1931, page 583 amended. Chapter 278.

QUESTION: Is such a contract as noted above under "Facts" made between a resident and non-resident, interstate commerce, laying the vendor open to prosecution under the Sherman Act?

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*This memorandum was written by J. Wayne Ley of the Legal Division.

OPINION: Yes.

DISCUSSION

THE FEDERAL RULE IN THE ABSENCE OF STATE LEGISLATION

The case of the Federal Trade Commission against Beechnut Company, 257 U.S. 441 (1921) reversing 264 Fed. 885, represents generally, the position of the United States Supreme Court with respect to contracts in interstate commerce to regulate resale prices.

The Beechnut case came before the Supreme Court on Writ of Certiorari from the Circuit Court which had set aside a cease and desist order issued by the Federal Trade Commission ordering the defendant company to refrain from engaging in an unfair method of competition, to wit: declining to sell its products to distributors who did not observe the prices fixed by it or who sold to others who failed to do so, and, in enforcing this policy, obtaining by various methods the names of dealers who cut prices or who sold to others who did so, and listing them as undesirable customers to whom it refused to sell until they gave assurance of their intention to conform to such sales policy in the future. The Supreme Court ruled that the order of the Federal Trade Commission was proper in most respects and that the action complained of was a combination in restraint of trade within the meaning of the Sherman Act.

The case of U.S. vs. Colgate, 250 U.S. 300 (1919) has been frequently cited as authority for the rule that where there is no express agreement to maintain prices, the Sherman Act is not violated. The facts in the Colgate and Beechnut cases are strikingly similar in several respects, and actually, in view of the fact that the action in the Colgate case was brought under the Criminal Appeals Act, the decision went off on the rather narrow ground that the indictment failed to charge the Colgate Company had made any agreement to maintain prices. Actually, therefore, the case can only be treated as recognizing the vendor's right to refuse to deal with anyone who fails to maintain suggested prices.

THE EFFECT, ON THE FEDERAL RULE, OF STATE LEGISLATION PERMITTING RESALE PRICE MAINTENANCE AGREEMENTS

(a) From the Federal Point of View: -

If the transaction in question constitutes interstate commerce, then, of course, the decisions of the Supreme Court would prevail. The problem, is to determine whether the particular transaction is an interstate act. The state court decisions may be helpful in determining the question although it must be recognized that the federal judiciary constitute the courts of last resort on such matters.

(b) From the State Point of View: -

The Supreme Court of Texas had the question of interstate commerce before it in Segal vs. McCall, 108 Texas 55; 184 S.W. 188, where there was a contract for the purchase of merchandise between a New York fashion company and a Texas buyer, which obligated the buyer to sell the vendor's patterns at no other prices than the catalog retail prices of the vendor. The Texas statute provided that any contract containing a provision that goods were not to be sold below a fixed price was void. The McCall Company brought suit for breach of contract and Segal defended on the ground that the contract contained provisions violating the federal and the state anti-trust laws.

The court, in holding that the contract was unenforceable, said in part -

> "A state has no power to regulate interstate commerce and is prohibited in so doing by the federal constitution. Only Congress may occupy this field but the provisions of the contract which are obnoxious to the Texas anti-trust act constitute no part of interstate commerce. They apply to acts to be performed by the vendee after the interstate commerce involved in the transaction has been completed. For a citizen of New York to sell and transport to a citizen in Texas goods and merchandise is to engage in interstate commerce; but when the sale and transaction has been completed and the property has been delivered in Texas to a citizen in Texas, the interstate transaction is ended. The use to which the property may be put in Texas and the acts of the vendee in relation to it while in Texas comes within the jurisdiction of the Texas laws. This contract is two-fold, in that it embraces a full contract for interstate commerce * * * and other provisions for acts to be performed in Texas after the interstate feature of the contract has been entirely fulfilled."

The case is only of interest to the writer because of the distinction which may be drawn between the liability which may attach to the non-resident vendor and the resident vendee when such a contract is made. The Texas court recognizes clearly that the contract itself is an interstate transaction although the disposition of the goods as soon as they arrive within the state may only amount to intrastate business. Thus, in a case where a state permits of such resale price maintenance agreements, the state court could consistently hold that the resident vendee was blameless under the state law and still the federal court could hold that the non-resident vendor had violated the Sherman Act.

The writer's conclusion, therefore, in this respect is that no matter how far the United States Supreme Court may go in extending the original-package rule it will not change its view that such contracts constitute interstate commerce, the result being, therefore, that the non-resident vendor is liable to prosecution under the Sherman Act even though the foreign state in which he sells his commodity permits such agreements.

METHODS OF CIRCUMVENTING THE FEDERAL RULE

(a) Where no intrastate question is involved:

As pointed out in Miss Golden's interesting and instructive resume, a bona fide agency relationship between the parties appears to be the only way of avoiding the federal prohibition against such agreements. The legal requirements of such an agency are stringent. The mere cloak of respectability, so to speak, is not an absolute protection by any means. The court will look through the form which such an agreement assumes to the substance thereof in determining whether it is a contract of sale or agency.

(b) Where intrastate questions are involved and the state permits resale price maintenance agreements and the vendor of the merchandise is a non-resident:

(1) Incorporation of a separate selling establishment in the state offers perhaps the only possible means of escape.

(2) Proceeding under the state police powers may offer a possible solution in those cases involving interstate commerce as pointed out in the study of "Price Cutting and Price Maintenance," by Seligman and Love at page 468. That is to say, non-resident vendors may possibly escape the penalties of the Sherman Act if the Supreme Court holds that the states may enact such legislation by virtue of its police powers. How far the Supreme Court might go is problematical; the following cases having been held proper subjects by a state under its police powers:

a. A state may prohibit the selling of intoxicating liquors transported in interstate commerce. Crowley vs. Christensen, 137 U. S. 86.

b. A state may make it a criminal offence to give an option to buy grain shipped in interstate commerce, at a future time. Booth vs. Ill., 184 U. S., 425.

c. A state may invalidate the contracts for the sale of shares of the capital stock of any corporation on margin or to be delivered at a future date. Otis vs. Parker, 187, U. S. 606.

d. A state may prohibit the possession of certain game during the closed season even though the statute governs game coming from without the state. New York, ex.rel. Silz, vs. Hesterberg, 211 U. S. 31.

Thus it is seen that the United States Supreme Court permits the state considerable discretion in deciding upon measures that are needful for the protection of its people, and it is quite possible that the Supreme Court may in the future accept the argument that state legislation permitting resale price maintenance agreements are permissible and hold that such legislation does not place limitations on transactions which would generally be considered in interstate commerce.

Although some few states have acted under their police powers in this respect, in matters affecting interstate commerce and have been sustained by their respective state courts, it must be recognized that ultimately the question, being a constitutional one, must be answered by the United States Supreme Court.

OFFICE OF THE NATIONAL RECOVERY ADMINISTRATION
THE DIVISION OF REVIEW

THE WORK OF THE DIVISION OF REVIEW

Executive Order No. 7075, dated June 15, 1935, established the Division of Review of the National Recovery Administration. The pertinent part of the Executive Order reads thus:

> The Division of Review shall assemble, analyze, and report upon the statistical information and records of experience of the operations of the various trades and industries heretofore subject to codes of fair competition, shall study the effects of such codes upon trade, industrial and labor conditions in general, and other related matters, shall make available for the protection and promotion of the public interest an adequate review of the effects of the Administration of Title I of the National Industrial Recovery Act, and the principles and policies put into effect thereunder, and shall otherwise aid the President in carrying out his functions under the said Title.

The study sections set up in the Division of Review covered these areas: industry studies, foreign trade studies, labor studies, trade practice studies, statistical studies, legal studies, administration studies, miscellaneous studies, and the writing of code histories. The materials which were produced by these sections are indicated below.

Except for the Code Histories, all items mentioned below are scheduled to be in mimeographed form by April 1, 1936.

THE CODE HISTORIES

The Code Histories are documented accounts of the formation and administration of the codes. They contain the definition of the industry and the principal products thereof: the classes of members in the industry; the history of code formation including an account of the sponsoring organizations, the conferences, negotiations and hearings which were held, and the activities in connection with obtaining approval of the code; the history of the administration of the code, covering the organization and operation of the code authority, the difficulties encountered in administration, the extent of compliance or non-compliance, and the general success or lack of success of the code; and an analysis of the operation of code provisions dealing with wages, hours, trade practices, and other provisions. These and other matters are canvassed not only in terms of the materials to be found in the files, but also in terms of the experiences of the deputies and others concerned with code formation and administration.

The Code Histories, (including histories of certain NRA units or agencies) are not mimeographed. They are to be turned over to the Department of Commerce in typewritten form. All told, approximately eight hundred and fifty (850) histories will be completed. This number includes all of the approved codes and some of the unapproved codes. (In Work Materials No. 18, Contents of Code Histories, will be found the outline which governed the preparation of Code Histories.)

(In the case of all approved codes and also in the case of some codes not carried to final approval, there are in NRA files further materials on industries. Particularly worthy of mention are the Volumes I, II and III which constitute the material officially submitted to the President in support of the recommendation for approval of each code. These volumes

set forth the origination of the code, the sponsoring group, the evidence advanced to support the proposal, the report of the Division of Research and Planning on the industry, the recommendations of the various Advisory Boards, certain types of official correspondence, the transcript of the formal hearing, and other pertinent matter. There is also much official information relating to amendments, interpretations, exemptions, and other rulings. The materials mentioned in this paragraph were of course not a part of the work of the Division of Review.)

THE WORK MATERIALS SERIES

In the work of the Division of Review a considerable number of studies and compilations of data (other than those noted below in the Evidence Studies Series and the Statistical Materials Series) have been made. These are listed below, grouped according to the character of the material. (In Work Materials No. 17, Tentative Outlines and Summaries of Studies in Process, these materials are fully described).

Industry Studies

Automobile Industry, An Economic Survey of
Bituminous Coal Industry under Free Competition and Code Regulation, Economic Survey of
Construction Industry and NRA Construction Codes, the
Electrical Manufacturing Industry, The
Fertilizer Industry, The
Fishery Industry and the Fishery Codes
Fishermen and Fishing Craft, Earnings of
Foreign Trade under the National Industrial Recovery Act
- Part A - Competitive Position of the United States in International Trade 1927-29 through 1934.
- Part B - Section 3 (e) of NIRA and its administration.
- Part C - Imports and Importing under NRA Codes.
- Part D - Exports and Exporting under NRA Codes.

Forest Products Industries, Foreign Trade Study of the
Iron and Steel Industry, The
Knitting Industries, The
Leather and Shoe Industries, The
Lumber and Timber Products Industry, Economic Problems of the
Men's Clothing Industry, The
Millinery Industry, The
Motion Picture Industry, The
Migration of Industry, The: The Shift of Twenty-Five Needle Trades From New York State, 1926 to 1934
National Income, A study of,
Paper Industry, The
Production, Prices, Employment and Payrolls in Industry, Agriculture and Railway Transportation, January 1923, to date
Retail Trades Study, The
Rubber Industry Study, The
Statistical Background of NRA
Textile Industry in the United Kingdom, France, Germany, Italy, and Japan
Textile Yarns and Fabrics
Tobacco Industry, The
Wholesale Trades Study, The
9675.

Women's Apparel Industry, Some Aspects of the

Trade Practice Studies

Commodities, Information Concerning: A Study of NRA and Related Experiences in Control
Distribution, Manufacturers' Control of: A Study of Trade Practice Provisions in Selected NRA Codes
Design Piracy: The Problem and Its Treatment Under NRA Codes
Electrical Mfg. Industry: Price Filing Study
Fertilizer Industry: Price Filing Study
Geographical Price Relations Under Codes of Fair Competition, Control of
Minimum Price Regulation Under Codes of Fair Competition
Multiple Basing Point System in the Lime Industry: Operation of the
Price Control in the Coffee Industry
Price Filing Under NRA Codes
Production Control Under NRA Codes, Some Aspects of,
Resale Price Maintenance Legislation in the United States
Retail Price Cutting, Restriction of, with special Emphasis on The Drug Industry.
Trade Practice Rules of The Federal Trade Commission (1914-1936): A classification for comparison with Trade Practice Provisions of NRA Codes.

Labor Studies

Employment, Payrolls, Hours, and Wages in 115 Selected Code Industries 1933-1935
Hours and Wages in American Industry
Labor Program Under the National Industrial Recovery Act, The
Part A. Introduction
Part B. Control of Hours and Reemployment
Part C. Control of Wages
Part D. Control of Other Conditions of Employment
Part E. Section 7(a) of the Recovery Act
PRA Census of Employment, June, October,1933
Puerto Rico Needlework, Homeworkers Survey

Administrative Studies

Administrative and Legal Aspects of Stays, Exemptions and Exceptions, Code Amendments, Conditional Orders of Approval
Administrative Interpretations of NRA Codes
Administrative Law and Procedure under the NIRA
Agreements Under Sections 4(a) and 7(b) of the NIRA
Approved Codes in Industry Groups, Classification of
Basic Code, the -- (Administrative Order X-61)
Code Authorities and Their Part in the Administration of the NIRA
Part A. Introduction
Part B. Nature, Composition and Organization of Code Authorities
Part C. Activities of the Code Authorities
Part D. Code Authority Finances
Part C. Summary and Evaluation

THE EVIDENCE STUDIES SERIES

The Evidence Studies were originally undertaken to gather material for pending court cases. After the Schechter decision the project was continued in order to assemble data for use in connection with the studies of the Division of Review. The data are particularly concerned with the nature, size and operations of the industry; and with the relation of the industry to interstate commerce. The industries covered by the Evidence Studies account for more than one-half of the total number of workers under codes. The list of these studies follows:

Automobile Manufacturing Industry
Automotive Parts and Equipment Industry
Baking Industry
Boot and Shoe Manufacturing Industry
Bottled Soft Drink Industry
Builders' Supplies Industry
Canning Industry
Chemical Manufacturing Industry
Cigar Manufacturing Industry
Coat and Suit Industry
Construction Industry
Cotton Garment Industry
Dress Manufacturing Industry
Electrical Contracting Industry
Electrical Manufacturing Industry
Fabricated Metal Products Mfg. Industry and Metal Finishing and Metal Coating Industry
Fishery Industry
Furniture Manufacturing Industry
General Contractors Industry
General Contractors Industry
Graphic Arts Industry
Graphic Arts Industry
Gray Iron Foundry Industry
Hosiery Industry
Infant's and Children's Wear Industry
Iron and Steel Industry
Leather Industry
Lumber and Timber Products Industry
Mason Contractors Industry
Men's Clothing Industry
Motion Picture Industry
Motor Vehicle Retailing Trade
Needlework Industry of Puerto Rico
Painting and Paperhanging Industry
Photo Engraving Industry
Plumbing Contracting Industry
Retail Lumber Industry
Retail Trade Industry
Retail Tire and Battery Trade Industry
Rubber Manufacturing Industry
Rubber Tire Manufacturing Industry
Shipbuilding Industry
Silk Textile Industry
Structural Clay Products Industry
Throwing Industry
Trucking Industry
Waste Materials Industry
Wholesale and Retail Food Industry
Waste Materials Industry
Wholesale and Retail Food Industry
Wholesale Fresh Fruit and Vegetable Industry
Wool Textile Industry

THE STATISTICAL MATERIALS SERIES

This series is supplementary to the Evidence Studies Series. The reports include data on establishments, firms, employment, payrolls, wages, hours, production capacities, shipments, sales, consumption, stocks, prices, material costs, failures, exports and imports. They also include notes on the principal qualifications that should be observed in using the data, the technical methods employed, and the applicability of the material to the study of the industries concerned. The following numbers appear in the series:
9675.

Asphalt Shingle and Roofing Industry
Business Furniture
Candy Manufacturing Industry
Carpet and Rug Industry
Cement Industry
Cleaning and Dyeing Trade
Coffee Industry
Copper and Brass Mill Products Industry
Cotton Textile Industry
Electrical Manufacturing Industry
9675.
Fertilizer Industry
Funeral Supply Industry
Glass Container Industry
Ice Manufacturing Industry
Knitted Outerwear Industry
Paint, Varnish, and Lacquer, Mfg. Industry
Plumbing Fixtures Industry
Rayon and Synthetic Yarn Producing Industry
Salt Producing Industry